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N. 3008

No. 15125

United States
Court of Appeals
for the Ninth Circuit

HARVEY L. WELLS and HARRY J. ALBERT-
SEN, on behalf of themselves, and others simi-
larly situated, Appellants,
vs.

J. C. PENNEY COMPANY, a corporation, and
THE CHASE MANHATTAN BANK, a cor-
poration, successor in interest to the Chase
National Bank of the City of New York,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

JUL - 3 1956

PAUL P. O'BRIEN, CLERK

No. 15125

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 6095

HARVEY L. WELLS and HARRY J. ALBERT-
SEN, on behalf of themselves and others sim-
ilarly situated,

Plaintiffs,

vs.

J. C. PENNEY COMPANY, a corporation, and
THE CHASE NATIONAL BANK OF THE
CITY OF NEW YORK, a national banking
Association, Defendants.

COMPLAINT

Plaintiffs allege:

1. Plaintiffs bring this action on behalf of themselves and all other former management staff employees of J. C. Penney Company and of any wholly owned subsidiary of J. C. Penney Company who at any time became participants under the Profit-Sharing Retirement Plan for J. C. Penney Company management staff established in 1940 and who did not attain retirement status thereunder, and the heirs and legal representatives of any such management staff employees who died prior to reaching retirement status or prior to the institution of this action. Said former management staff employees of J. C. Penney Company number in

excess of five hundred, and it is therefore impracticable to bring them before the Court.

2. Plaintiff Harvey L. Wells is a citizen and resident of the State of Oregon. Plaintiff Harry J. Albertsen is a citizen and resident of the State of California. Defendant J. C. Penney Company is a corporation incorporated under the laws of the State of Delaware. Defendant The Chase National Bank of the City of New York is a national banking association organized under the laws of the United States of America, having its office and principal place of business in the City of New York, State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

3. Plaintiff Harvey L. Wells was born on the 24th day of September, 1896. Plaintiff Harry J. Albertsen was born on April 6, 1896.

4. During the year 1939 and thereafter until the year 1944 the plaintiff Harvey L. Wells was the manager of the store of the defendant J. C. Penney Company at Streator, Illinois. In 1944 the plaintiff Harvey L. Wells became the manager of the store of defendant J. C. Penney Company at Corvallis, Oregon, and continued as such manager until and including August 31, 1948. Plaintiff Harvey L. Wells submitted his resignation as manager of the Corvallis store on or about August 13, 1948.

5. Plaintiff Harry J. Albertsen during the year 1939 and up until December 31, 1950, was the manager of the store of the defendant J. C. Penney

Company located at 4713 Whittier Boulevard, Los Angeles, California. On or about the 20th day of November, 1950, the defendant J. C. Penney Company discharged the plaintiff Harry J. Albertsen as manager of said store, effective as of December 31, 1950.

6. On or about July 1, 1940, the defendant J. C. Penney Company adopted and issued to the members of its management staff hereinbefore-mentioned a profit-sharing retirement plan, a true copy of which is hereto annexed, marked "Exhibit X" and made a part hereof. At or about the time of the issuance of said plan the defendant J. C. Penney Company entered into an agreement of trust with the defendant The Chase National Bank of the City of New York, a true copy of which is attached marked "Exhibit A" and made a part hereof and which is also "Exhibit" A to said plan heretofore marked "Exhibit X" as annexed hereto.

7. At the time the defendant J. C. Penney Company adopted and issued to the members of its management staff the aforesaid profit-sharing retirement plan, its management staff included in excess of 1,800 persons. Said plan so adopted and issued by the defendant J. C. Penney Company was an inducement to each of the plaintiffs and to the other members of the management staff, including the former members of the management staff for whom plaintiffs bring this action, to continue in the employment of said defendant J. C. Penney Company. Plaintiffs and the other former members of

the management staff of J. C. Penney Company for whom the plaintiffs bring this action, in reliance upon said plan and the provisions thereof, continued in the employment of the defendant J. C. Penney Company for a number of years, until the employment of the plaintiffs was terminated as hereinbefore alleged, and the employment of the other former members of the management staff of J. C. Penney Company for whom the plaintiffs bring this action was terminated either by resignation, death or disability, or by reason of their discharge by the defendant J. C. Penney Company.

8. During the time the plaintiff Harvey L. Wells continued as a manager of the store of the defendant J. C. Penney Company, plaintiff Harvey L. Wells made contributions under the aforesaid profit-sharing retirement plan from his earnings for the following years in the following amounts:

1939.....	\$ 1,989.23
1940.....	929.83
1941.....	2,918.61
1942.....	1,797.71
1943.....	1,403.40
1944.....	1,371.73
1945.....	843.65
1946.....	1,293.97
1947.....	1,381.57
<hr/>	
Total:	\$13,929.70

That all of the aforesaid contributions were paid over to the defendant The Chase National Bank of

the City of New York at the time each contribution was made.

9. During the time the plaintiff Harry J. Albertsen continued as a manager of the store of the defendant J. C. Penney Company, plaintiff Harry J. Albertsen made contributions under the aforesaid profit-sharing retirement plan from his earnings for the following years in the following amounts:

1940.....	\$ 2,233.64
1941.....	4,772.85
1942.....	3,728.56
1943.....	2,959.61
1944.....	3,017.85
1945.....	2,659.52
1946.....	2,483.22
1947.....	1,857.04
1948.....	2,037.01
1949.....	2,107.61

Total: \$27,856.91

That all of the aforesaid contributions were paid over to the defendant The Chase National Bank of the City of New York at the time each contribution was made.

10. During the years that the former members of the management staff of J. C. Penney Company for whom plaintiffs bring this action were participants under the aforementioned profit-sharing retirement plan, each thereof made contributions from his earnings for each year, and the amounts of said

contributions were at the time thereof paid over to the defendant The Chase National Bank of the City of New York, as trustee under said plan.

11. On or about the first day of August, 1940, the defendant J. C. Penney Company sold to the defendant The Chase National Bank of the City of New York as trustee under the aforementioned agreement of trust, "Exhibit A" to "Exhibit X" hereto annexed, 200,000 shares of the capital stock of the defendant J. C. Penney Company at and for the agreed price of \$6,000,000. All of the funds to purchase said stock were obtained by the defendant The Chase National Bank of the City of New York under and by reason of a loan procured from the Continental Illinois National Bank and Trust Company of Chicago in the sum of \$5,700,000 and from funds paid over to said The Chase National Bank of the City of New York as trustee by the participants under the aforementioned plan.

12. On or about the 16th day of January, 1946, the defendant J. C. Penney Company declared a stock dividend of two shares of its common stock for each share of common stock then outstanding, and by reason of said stock dividend the number of shares dealt with in said plan has been multiplied by three in all instances, and said defendant The Chase National Bank of the City of New York held as trustee under said plan a total of 600,000 shares of said common stock of the defendant J. C. Penney Company.

13. By reason of their continuance in said em-

ployment of the defendant J. C. Penney Company, plaintiffs and the other participants under said plan thereafter became entitled to additional payments into said fund by the defendant J. C. Penney Company, and all of said payments, when and as made by the defendant J. C. Penney Company, became and remained the property of the plaintiffs and the other participants in said plan at the time said payments were made.

14. By reason of the facts herein alleged, the plaintiff Harvey L. Wells upon the termination of his employment with the defendant J. C. Penney Company became entitled to in excess of 250 shares of the capital stock of J. C. Penney Company held by the defendant The Chase National Bank of the City of New York as trustee under the aforementioned plan, and said stock has a present value in excess of \$16,750. The plaintiff Harvey L. Wells also became entitled to all the dividends accruing upon said shares of stock from the time of the termination of his employment by the defendant J. C. Penney Company, and the amount of said dividends exceeds the sum of \$2,000.

15. By reason of the facts herein alleged, the plaintiff Harry J. Albertsen upon the termination of his employment with the defendant J. C. Penney Company became entitled to in excess of 500 shares of the capital stock of J. C. Penney Company held by the defendant The Chase National Bank of the City of New York as trustee under the aforementioned plan, and said stock has a present value in excess of \$33,500.

16. By reason of the facts herein alleged, each of the former members of the management employment staff of the defendant J. C. Penney Company for whom the plaintiffs bring this action at the time of termination of his or her employment became entitled to a number of shares of the stock held by the defendant The Chase National Bank of the City of New York as trustee under said plan in the proportion that the contributions and earnings of each bore to the total contributions and earnings which were used for the acquisition of said stock and became entitled to dividends accruing upon said shares of stock thereafter.

17. By reason of remaining in the employment of the defendant J. C. Penney Company, in reliance upon the provisions of the aforementioned profit-sharing retirement plan, each of the plaintiffs and each of the former members of the management staff of the defendant J. C. Penney Company for whom this action is prosecuted earned in each year in which they continued in such employment the sums contributed and to be contributed by the defendant J. C. Penney Company under the terms and provisions of said profit-sharing retirement plan.

18. Although the defendant J. C. Penney Company provided no funds for the acquisition by the trustee of the aforementioned shares of stock of J. C. Penney Company other than such sums as were earned each year by the members of its management staff through their continued employment, and

although all sums used for the acquisition of said shares of stock by the trustee and for the liquidation of the loan procured by the trustee in purchasing said stock were supplied by the members of its management staff, the defendant J. C. Penney Company provided in said plan that the members of its management staff, the defendant J. C. Penney continued employment and contributions and earnings paid over to the trustee, should be awarded allotments from such stock only upon the chance of their survival and good health until retirement age and upon the chance of their continuance in the employment of J. C. Penney Company up to the time of such retirement; and further provided in said plan that said allocations of stock should be increased percentage-wise by the reason of the death of other members of the management staff or their resignation or their discharge from their employment. As so constituted, said plan was and is a wagering contract, and lottery, and contrary to public policy and contrary to the public policy of the State of New York.

19. The profit-sharing retirement plan and agreement of trust annexed hereto and marked "Exhibit X," so far as the same purported to set up a trust with respect to the shares of the capital stock of J. C. Penney Company, is void and of no effect, and said shares of stock were and now are held by the defendant The Chase National Bank of the City of New York as the trustee of a resulting trust in favor of the plaintiffs and the other former

members of the management staff of the defendant J. C. Penney Company and present members of its management staff in proportion to their contributions and earnings made under said plan and which were used in the acquisition of said shares of capital stock of J. C. Penney Company.

20. Plaintiffs are advised and therefore allege that the defendant The Chase National Bank of the City of New York has from time to time at the direction of the defendant J. C. Penney Company made deliveries of stock from the shares held in trust by it to persons asserted to have acquired retirement status under the aforementioned plan. Plaintiffs are advised and allege that the defendant The Chase National Bank of the City of New York still has in its possession in excess of 500,000 shares of the present capital stock of J. C. Penney Company, of a value in excess of \$33,000,000.

21. The rights of the plaintiffs to shares of stock held under the aforementioned trust agreement and the rights of all former members of the management staff of J. C. Penney Company to shares of stock held under said trust agreement present common questions of law.

Wherefore, Plaintiffs pray for relief and judgment as follows:

1. Adjudging and decreeing that the trust purported to be established under the profit-sharing retirement plan and agreement of trust, so far as it pertains to the shares of capital stock of J. C.

Penney Company, was and is illegal and void and of no effect.

2. Adjudging and decreeing that the defendant The Chase National Bank of the City of New York holds the shares of stock of J. C. Penney Company now in its possession as trustee for the plaintiffs and the former members of the management staff of J. C. Penney Company and the present members of its management staff as the beneficiaries of the resulting trust in proportion to their contributions and earnings contributed in the acquisition of said shares of stock.

3. Requiring the defendant The Chase National Bank of the City of New York to render an accounting of all of its transactions in connection with the acquisition of said shares of stock, all dividends received thereon, any distributions and deliveries thereof, and all of the contributions and earnings received by it in connection with the acquisition thereof.

4. Adjudging and decreeing what proportion of the shares of the stock of the J. C. Penney Company were acquired by the contributions and earnings of the plaintiffs and the former members of the management staff of J. C. Penney Company, and directing the delivery to each of the plaintiffs and to each of the former members of the management staff of J. C. Penney Company of the number of shares which the contributions of each bears to the total thereof.

5. Awarding to plaintiffs compensation for the

reasonable value of the services of their attorneys and counsel in the prosecution of this action, and reimbursement of their costs and expenses incurred herein, and decreeing that the sums so awarded shall be and constitute a lien upon all of the shares of stock held by the defendant The Chase National Bank of the City of New York for the plaintiffs and the former members of the management staff of J. C. Penney Company and for any and all other persons participating in said fund.

6. For such other and further relief as to the Court shall seem equitable and just in the premises.

/s/ KING, WOOD, MILLER,
ANDERSON & NASH,

/s/ RALPH H. KING

Attorneys for Plaintiffs.

EXHIBIT "X"

PROFIT-SHARING RETIREMENT PLAN (For J. C. Penney Company Management Staff)

This Plan will apply to management staff employees of J. C. Penney Company as specified in the Plan. It will also apply to eligible employees of any wholly owned subsidiary (meaning any subsidiary of which the company owns all the common stock except qualifying shares, if any), and in all cases any reference to J. C. Penney Company will include such subsidiaries. It shall be in the sole judgment of the Administrative Committee to de-

Exhibit "X"—(Continued)

termine, in keeping with the purposes of the Plan, as to eligibility of subsidiaries' employees and what constitutes eligible compensation for them.

The term "compensation" as used herein means the amount received by an employee of J. C. Penney Company under contract as a portion of the profits of the store managed by him, or the amount received by a central or branch office employee as his or her share of the General Office Compensation Fund, as the case may be, and excludes regular salary. If so determined by the Administrative Committee, it may also include other compensation than that specified above, apart from regular salary, based on profits received by employees of J. C. Penney Company.

Purpose

The purpose of this Plan is to institute a means of providing a retirement income for those of its management staff, including store managers and general executives, who remain in the company's employ until retirement.

It is further intended to include and continue the principle of ownership participation which has been such a powerful incentive to the management staff in all the development and operation of the company.

Incidental to such Profit-Sharing Retirement Plan, the company has adopted a retirement policy for its employees. Under this policy an age has been set for retirement when it seems wise to grant employees relief from active service. The setting of

Exhibit "X" — (Continued)

this age also takes into consideration the need for making room on the management staff for younger employees who may contribute quicker recognition and faster development of new and modern merchandising techniques.

Thus, the purpose of the Plan is twofold: to help provide security for those who have served well, and to make available a further incentive to those who serve and are preparing to serve.

To attain such purpose the company has adopted this Plan and caused a Trust Fund to be set up for handling the funds and securities accruing under the Plan. The company has made available for sale at approximate book value to the Trustees of such Trust Fund, a block of the company's stock in order that the management staff, as a group, may enjoy ownership participation in the future, and the company will make such annual contributions as called for under the Plan.

Provisions

1. There shall be a bank or trust company selected by the Board of Directors of J. C. Penney Company which shall act as Trustee under the plan. It shall purchase and hold the J. C. Penney Company common stock hereinafter referred to and shall have voting power with respect thereto. It shall receive all cash or securities paid into the Fund, whether received from participants or the company, and shall collect all income derived from any securities at any time in the Fund. It shall have investment powers with reference to moneys

Exhibit "X"—(Continued)

received by it as prescribed in the Trust Agreement. A copy of the Trust Agreement when executed shall be attached to this plan and marked Exhibit A. Said Trustee shall make all payments and distributions from the Fund and arrange for the distribution of the J. C. Penney Company stock as directed by the Administrative Committee. It shall perform such banking and other functions as are provided for in the Trust Agreement.

2. There shall be an Administrative Committee consisting of five persons appointed by, to serve without compensation and be replaced at the will of, the Board of Directors of J. C. Penney Company. If otherwise eligible, the fact that an employee is a member of this committee shall not preclude his participating in the Plan on the same basis as that of other eligible employees. Such committee shall have authority to perform or direct all operating procedures and functions required in the operation of the Plan and not performed by the Trustee. The Administrative Committee may adopt such rules and regulations with regard to the administration of the plan as are consistent with the terms of the Plan and of the Trust Agreement. In connection with the Plan, the committee shall also have the right in its judgment to interpret the provisions of the Plan, to determine the eligibility and rights of employees as to consecutiveness and length of employment service, in connection with leaves of absence approved by company executives to pass upon question of whether or not withdrawal

Exhibit "X" — (Continued)

from Fund should be required, to decide what constitutes eligible compensation and what constitutes regular salary, to determine what represents the market value of any of the assets of the Fund, and to make any decisions which have to do with operations of the Plan. It shall have the right in its sole judgment to determine the type and form of annuity or other benefits for any participant. It shall have the right in its sole judgment to determine whether all or any part of any receipts (other than participants' contributions) or expenditures during a year shall constitute Fund earnings or expenses for that year or any other year regardless of any other provisions of the Plan and, if any receipts or expenditures are determined not to constitute earnings or expenses, such shall be handled in the accounts of the Fund as directed by the committee. The Administrative Committee shall also have the right to establish any reserves against depreciation of assets which in its opinion are warranted. Such reserves may be set up from any income of the Fund. It shall also have the right to decide that additions to and reductions from any reserves shall affect the earnings of the Fund for any year it specifies. It shall keep adequate record of its proceedings and acts. As to all matters requiring the exercise of discretion by the Administrative Committee, action shall be taken upon the agreement or discretion of at least three of the five members of the Administrative Committee. Ministerial powers in connection with the administration of the

Exhibit "X" — (Continued)

Plan may be delegated by the committee to any member or members thereof.

3. The following classes of employees of the company and of any wholly owned subsidiary shall be eligible to participate in the Plan: store managers and central and branch office employees who have a contract entitling them to receive compensation as hereinbefore defined, which includes store managers, buyers, employees holding positions of responsibility in the central and branch offices of the company, and executives, including those who are directors, but excluding those who serve as directors only. It shall also include employees holding positions of responsibility in any wholly owned subsidiary determined by the Administrative Committee to be eligible. It shall also include any other classes of employees entitled to receive compensation who may be determined by the Administrative Committee at any time to be eligible. Participation by all eligible employees shall be required, except that participation by an otherwise eligible employee whose compensation does not cover a full calendar year shall not be permitted for such year, except in any case where a leave of absence covering that portion of any year for which compensation is not paid is approved by the Administrative Committee as not requiring withdrawal. In any case, however, where a separate manager contract or contracts and/or rights to share in the General Office Compensation Fund each cover only a portion of a year but combined cover a full calendar year, participa-

Exhibit "X"—(Continued)

tion for such year shall be permitted on the basis of total compensation received. In any case or cases where, because of special circumstances, it is recommended that more than one employee of a store shall be considered as an eligible manager, the Administrative Committee shall have sole power to decide as to eligibility.

4. A contribution to the Fund must be made every year by every eligible employee, equal to $33\frac{1}{3}\%$ of his or her compensation earned when such compensation covers a full calendar year, or the portion of the year during which he or she worked when an approved leave of absence was in effect for the portion of the year not covered by the compensation. There shall be no right or requirement of contribution for any period not covered by compensation. The required contribution must be made at the time of payment of compensation to the participant in accordance with instructions of the Administrative Committee. If $33\frac{1}{3}\%$ of any year's compensation for any participant shall be \$500.00 or less, then all of the participant's compensation up to \$500.00 may be contributed. There shall be no privilege of withdrawal of any amount contributed except upon leaving the employ of the company or reaching retirement age or ceasing to be an eligible employee.

5. The company will issue and sell for cash to the Trustee, as soon after the adoption of the plan as practicable, 200,000 shares of the authorized unissued common stock of the company at its approxi-

Exhibit "X"—(Continued)

mate book value per share as at January 1, 1940, or \$30.00, less adjustment for any dividend paid subsequent to January 1, 1940, which adjustment for purposes of the Plan shall be considered dividends. Such Trustee shall hold said stock for distribution in accordance with the terms of the Plan and of the Trust Agreement, provided that said Trustee shall have authority to borrow from outside sources, with this stock as collateral, upon terms approved by the Administrative Committee, a sufficient sum to pay the company the purchase price of said stock, which loan shall be repaid by the Trustee from the earnings of the Fund and any other moneys received by it. The Trustee shall have such other rights with respect to such stock held by it as are contained in the Trust Agreement. In the event of any later purchase of stock by the Trustee through exercise of rights to purchase, or receipt of dividends in the form of stock, or expansion or contraction in the number of shares held by it through any recapitalization, merger, or other change in the form of the company's capitalization, any reference contained herein to a number of shares of J. C. Penney Company common stock shall be deemed to be increased or decreased proportionately as a result of the number of shares resulting from such adjustment and any additional expenditures incurred in connection therewith shall be proportionately applied to the cost of any remaining shares held by the Trustee.

6. J. C. Penney Company shall contribute (sub-

Exhibit "X" — (Continued)

ject to the provisions of Article "15") to the Fund after the close of each calendar year, the following amounts for credit to the accounts as specified in the Plan:

(a) An amount equal to 2% of the prior year's aggregate regular salary paid to all employees receiving compensation as defined in the Plan for all or any part of the respective year. Such annual payment will be discontinued, however, at such time as the Reserve for Retirement account shall, in the opinion of the Board of Directors of J. C. Penney Company, have been built up to such a point as to eliminate the need for further credit of such a contribution.

(b) An amount equal to 6% of the company's net profit for the prior calendar year (including the net profit of any wholly owned subsidiary) available to its common stock (before the application of this provision "6.(b)") as reflected by the books of the company, in excess of 15% of the common stock book value of the company (represented by its capital and undistributed surplus, including the undistributed surplus of wholly owned subsidiaries) as at the beginning of such prior calendar year, except that in any case of increase or decrease of book value during any year by issuance and sale or repurchase of its common stock, proper adjustment shall be made to reflect the increase or decrease in the book value for the portion of the year the book value was affected through such transaction.

Exhibit "X"—(Continued)

7. The following shall apply in connection with the disposition of the shares of J. C. Penney Company stock purchased by the Trustee from the company and of the moneys received by the Trustee hereunder:

(a) A separate account shall be kept for each participant to which his or her contributions shall be credited as of the beginning of the year immediately following that which the compensation covered.

(b) All amounts contributed by the company under Article "6.(b)" shall be placed in an Excess Profits account, no portion of which shall be credited or become available to any participant before withdrawal from the Plan because of retirement or other cause.

(c) The 200,000 shares of J. C. Penney Company common stock shall be separated in the Fund's accounts into two blocks—one of 50,000 and one of 150,000 shares with actual cost (after any dividend adjustment, as prescribed in Article "5") applied to each.

(d) All amounts contributed by the company under Article "6.(a)" above shall be credited as of the beginning of the year immediately after that for which the payment covered, as follows: Earliest receipts shall be credited to the cost of the 50,000 share block until cost of same is entirely covered by such, or other, credits, then to a Reserve for retirement account. However, any such receipt after the first ten years after the adoption of the Plan

Exhibit "X"—(Continued)

shall be credited to a Reserve for Retirement account, regardless of whether the cost of the 50,000 share block is covered.

(e) All cash dividends received by the Trustee on any of the 200,000 shares of stock (including any adjustment made in the cost price of the stock to cover dividends subsequent to January 1, 1940—see Article "5") shall be applied, as received, to any cost in connection with financing the purchase of said stock and then shall be credited to any uncovered cost determined as applying to the 50,000 share block until cost of same is entirely covered, and thereafter shall be credited to a Dividend account. Credits prescribed by this provision shall be subject to the provisions of subdivision "(h)" of this article.

(f) Net earnings from the operation of the Fund for any year (not including dividends on any of the 200,000 shares of J. C. Penney Company common stock) as determined by the Administrative Committee (after charges referred to in subdivision "(h)" of this article) shall be credited after but as of the close of each year to the accounts of those participants still eligible for participation at such year-end. Credit shall be allowed in the proportion that each participant's average credit for the year bears to the average of all the credits for such year of all remaining participants in the Fund at such year-end.

(g) Any other receipts determined by the Administrative Committee to be earnings subject to allo-

Exhibit "X"—(Continued)

cation shall be credited to participants' accounts in such proportionate measure as determined by that committee.

(h) Expenses approved by the Administrative Committee which are incurred by the company or by the Trustee through the operation of the Plan, payment of which is not assumed by the company, shall be charged against any earnings of the Fund to the extent available and any excess shall be charged against the Dividend account or as otherwise directed by the Administrative Committee, except that no part of the same shall be directly charged against participants' contributions. At any time that a deficiency occurs in the Reserve for Retirement account, the Administrative Committee may determine such deficit to be expense and direct charging the same against the Dividend account.

8. Incidental to this Plan, the following retirement policy has been adopted for all active salaried employees of the company and any wholly owned subsidiary, excluding directors who serve in that capacity only:

(a) Effective beginning January 1, 1940, it will be optional with the company in the discretion of the Board of Directors to permit retirement of any employees who have attained or attain the age of 60 years.

(b) Effective beginning January 1, 1945, retirement shall be compulsory for those employees who have attained or attain the age of 60 years, except that in special cases the Board of Directors, in its discretion, may delay from year to year the separa-

Exhibit "X"—(Continued)

tion of any such employee from the company's employment, but such person must, nevertheless, withdraw from participation in the Plan at the retirement age of 60 years.

(c) Effective beginning January 1, 1945, it will be optional with the Company in the discretion of the Board of Directors to permit retirement of any employees who have attained or attain the age of 55 years.

(d) The applicable retirement age for compulsory retirement of all employees shall be deemed to have been reached on the 1st day of July of any calendar year in which he or she attains such age, but not earlier than July 1, 1945. In cases of optional retirement under the terms of subdivisions "(a)" and "(c)" of this article, permission and service termination shall be effective as of July 1 next succeeding the company's permission.

(e) Prior to January 1, 1945, if any eligible employee leaves the employ of the company voluntarily or involuntarily without obtaining permission of the Board of Directors to retire, or, commencing January 1, 1945, if any eligible employee leaves the employ of the company voluntarily or involuntarily after attaining the age of 55 years, but before attaining the age of 60 years, and fails to obtain the permission of the Board of Directors for retirement, he or she shall not be considered, for the purpose of this Plan, to have reached retirement age.

9. Withdrawal of participating employees at all times shall be governed by the following conditions:

(a) Any participant leaving the employ of the

Exhibit "X" — (Continued)

company, voluntarily or otherwise, must withdraw entirely from the Plan, except in cases where a participant secures a leave of absence approved by company executives, and the Administrative Committee approves his or her absence as not requiring withdrawal from the Plan. If a participant during an approved leave of absence leaves the employ of the company for any cause other than attainment of retirement status, or ceases service through death, he or she shall be considered not to have had the leave of absence and to have withdrawn from the Plan as of the date when his or her leave of absence began. However, for purposes of settlement of the account of the withdrawing participant under the terms of Article "10.C", the date of withdrawal for computation of any credit due will be considered to be the actual date of service termination rather than the date that the leave of absence began.

(b) If, after having participated and continuing actively in the company's employ, any participant ceases to have the right to receive compensation, as heretofore defined, for twelve consecutive full calendar months immediately subsequent to participation, such participant must withdraw from the Plan at the end of that period. However, if in the judgment of the Board of Directors of the company the circumstances surrounding such elimination of the right to receive compensation warrant other action, the Administrative Committee shall have the right to require earlier withdrawal or to grant extension of participation for an additional period not to exceed twelve months.

Exhibit "X" — (Continued)

10. The benefits to be distributed from the Fund to participants withdrawing from participation in the Plan shall be as follows:

A. Retirements From Active Salaried Employment: Any participant reaching retirement status as provided in Article "8" will receive:

(a) A paid-up non-assignable annuity to be purchased by the Administrative Committee from an insurance company in such a form as designated by that committee as best meeting the needs of the individual's situation, which shall be purchased with an amount equal to the aggregate of the following:

1. The total of all the participant's own contributions then standing to his or her credit in the Fund, and

2. An amount representing the aggregate, for all years of participation, of the amounts for each year of participation represented by that proportion of the company's contribution based on excess profit for the respective year that the participant's personal contribution for that year bore to all personal contributions for the year, and

3. That proportion of any net balance then in the Dividend account equal to the amount that the participant's total contributions then in the Fund bears to the aggregate contributions of all participants then in the Fund, and

4. The total of all credits to the participant's account representing his or her share of the earnings of the Fund.

Except that, if a participant reaches retirement status and dies before arrangements for purchase of

Exhibit "X"—(Continued)

an annuity are completed, benefits shall be determined under the terms of subdivision "B" of this Article "10". This provision, however, shall in no way affect the right of a beneficiary or legal representative to receive, as outlined under the terms of subdivision "A.(b)" of this Article "10", shares of J. C. Penney Company common stock.

(b) 1. In addition, the retiring participant will receive without cost, from the 50,000 share block of J. C. Penney Company common stock, that number of shares (but never in excess of 1,000 shares) represented by the proportion of 150,000 shares that the participant's total contributions at the time of his or her retirement bear to the aggregate of such contributions of all participants in the Fund at such time—except that at any time that any cost determined as applying to the 50,000 share block is not covered by credits, the participant, in order to receive any shares, must pay the Trustee or have deducted from the amount available for the purchase of his annuity, the net debit cost at the time of retirement of the shares to which he or she is entitled.

2. When the 50,000 share block of stock is exhausted, distribution on retirement shall be from the 150,000 share block, based on the proportion of the remaining shares that the retiring participant's total contributions at the time of his or her retirement bear to the aggregate contributions of all participants at such time. In such event, the stock shall be delivered to the retiring participant without charge and there shall be charged against the Reserve for Retirement account the uncovered cost of the stock

Exhibit "X" — (Continued)

delivered to any retiring participant as represented by the stock account of the Fund. The number of shares to be distributed to any participant shall be limited to 1,000.

3. Adjustment shall be made with any retiring participant to cover any dividends received by the Trustee, on the shares of stock to which the participant is entitled, subsequent to the date of retirement.

4. Adjustment shall be made of any fractional shares resulting from the apportionment as follows: if the fraction is greater than one-half, a full share shall be delivered in lieu thereof; if the fraction is less than one-half, it shall be disregarded.

B. Separations, Other Than Retirements, From Active Salaried Employment and Required Withdrawals Because of Loss of Eligibility or Death of a Participant:

Any participant leaving the employ of the company and not having attained regular or specially approved retirement status, or

Any participant required to withdraw from participation in the Plan, regardless of the circumstances surrounding the withdrawal, including the death of a participant, will receive:

(a) An amount in cash from the Fund computed as at the date of withdrawal by the same method followed in determining the amount which would be used for the purchase of an annuity in the case of a participant attaining retirement age, but said participant shall not be entitled to receive any shares of J. C. Penney Company common stock.

Exhibit "X"—(Continued)

(b) 1. Upon any separation other than a regular or approved retirement, the Administrative Committee may, with the approval and consent of the directly affected participant or the participant's beneficiary in case of death, arrange for the purchase of such annuity or insurance, with the amount of cash due to participant, as appears advisable.

2. Upon the death of any participant, distribution of the amount due the deceased participant shall be made to the designated beneficiary of the participant, or, if such designated beneficiary be dead, or if no beneficiary has been designated, then to the legal representative of the deceased participant, providing that, in any of the foregoing cases, payment of deceased's funeral expenses may be made from such distributive amount before any distribution is made to the beneficiary or legal representative.

3. In any case where the Administrative Committee shall deem it advisable because of current economic conditions or because it shall deem it to be for the best interest of the withdrawing participant, his or her beneficiary or legal representative, the administrative Committee shall have the absolute right in its sole judgment: (a) to defer payment of any amount due a participant, beneficiary or legal representative for a period of 90 days from the date of withdrawal, or (b) to direct payment of any amount due a withdrawing participant or his or her beneficiary or legal representative over a period not to exceed three years after the date of withdrawal, such payments to be made at such times and in such

Exhibit "X" — (Continued)

amounts during such periods as shall be determined by the Administrative Committee. In any case of such deferred payment, no interest on any amount withheld will be paid.

C. Upon any participant's withdrawal, for retirement or otherwise, the market value of all securities held by the Fund, including any remaining shares of the 150,000 share block of J. C. Penney Company stock, but excluding any remaining shares of the 50,000 share block, shall be ascertained as of the date of the withdrawal. After application of any balance in the Reserve for Retirement account to any uncovered cost of any J. C. Penney Company stock included in the computation, the total net cost value of the assets of the Fund (after application of any reserve for depreciation of assets) shall also be determined. Notwithstanding the provision "A" and "B" of this article, if the market value should be less than such net cost value of the assets, there shall be deducted from any credit due the withdrawing participant his or her share of the deficiency measured by the ratio that the withdrawing participant's total right of withdrawal (without J. C. Penney Company common stock due upon retirement) bears to the total credit that would that day be due to all participants if withdrawing.

D. No circumstances arising subsequent to the effective date of withdrawal shall entitle any withdrawn participant to any benefit other than as determined as of the effective date of withdrawal.

11. Any reference in this Plan to "market" price or value shall be taken to mean the average of the

Exhibit "X" — (Continued)

closing bid and asked prices for the next five consecutive business days immediately following the date referred to. In the event that closing market prices as referred to are not available for any day or days, then the Administrative Committee shall be empowered to use such price or value as in its judgment is proper.

12. Contributions by participants to the Fund upon the basis as provided in Article "4" shall be mandatory except that the Administrative Committee shall have the right in its sole judgment when it deems that exceptional circumstances in connection with a participant's financial affairs require it, to reduce by such amount as it deems necessary under the circumstances, the required contribution of such participant for any particular year. Such reduction shall only be made upon application of a participant which shall disclose fully the reason upon which the participant relies in making such request.

13. Loans to participants from the Fund shall not be made under any circumstances and no participant shall assign, pledge, or encumber any part of his or her interest in the Fund and any attempt to do so shall be inoperative and void.

14. The Administrative Committee shall determine what in its judgment constitutes necessary detail work and records for the operation of the Fund. Expenses of the Trustee and of J. C. Penney Company in the operation of the Plan may, in the discretion of the Board of Directors of the company, be borne in whole or in part, by the company or by the Fund.

Exhibit "X"—(Continued)

15. J. C. Penney Company shall, in the sole judgment of its Board of Directors, have the power to at any time increase, decrease, or dispense with any company contribution called for under the Plan, and shall also have the power to substitute any form of stock or securities for cash. In case of any such increase or decrease in contribution or any substitution, it shall be in the sole judgment of the Administrative Committee to decide as to disposition, in the accounts of the Fund, of the increase or decrease and, also, as to any such substitution, to decide as to the value to apply in making any credit on any of the accounts of the Fund.

16. J. C. Penney Company does not guarantee any of the benefits provided in this Plan, but contributions once made by the company shall be irrevocable and no part of the Fund in the possession of the Trustee, excepting so much of the moneys for which it may be reimbursed for expense of operation of the Plan, shall ever revert to the company or be diverted to or used for any purposes other than for the exclusive benefit of eligible employees covered by the Plan.

17. The Board of Directors shall have the right to alter, modify, or amend in whole or in part, any of the provisions of this or any incidental plan, provided, however, that such alterations, modifications, or amendments shall not in any way be in contravention of the provisions of Article "16".

18. In any case or cases that it is impossible or because of economic conditions or special conditions pertaining to a retiring participant, it appears im-

Exhibit "X"—(Continued)

practicable or inadvisable to purchase an annuity or annuities, the Administrative Committee shall have the right in its discretion, and subject to the approval of the company's Board of Directors, to substitute such form of settlement as it deems advisable and in keeping with the purposes of the Plan for any annuity due a retiring participant.

19. In the discretion of the Administrative Committee, in order to safeguard the interests of all participants in the Fund, when current economic conditions shall make it appear advisable, any withdrawing participant or a beneficiary or legal representative entitled to receive cash from the Fund shall receive, in lieu of the distributive amount due to him or her, his or her prorata share of the Fund (as determined under Article "10") in cash and/or in securities of the Fund (exclusive of any of the 200,000 shares of J. C. Penney Company common stock) at the market value of the assets of the Fund on the date of withdrawal.

20. Neither the Trustee nor J. C. Penney Company nor the members of the Administrative Committee at any time functioning under the Plan shall be liable in any way if the Fund should prove insufficient to provide the benefits herein contemplated, or for any depreciation in the market or book value of the J. C. Penney Company common stock purchased by the Trustee occurring by reason of its continuing to hold the same for the purposes of the Plan.

21. Neither the establishment of this Profit-Sharing Retirement Plan nor any incidental plan nor

Exhibit "X" — (Continued)

any action hereafter taken by the Trustee or by the Board of Directors of J. C. Penney Company or by the Administrative Committee thereunder shall be construed as giving to any employee a right to be retained in the service of the company or any right or claim to any benefits under the Plan after discharge from the service of the company, unless the right to such benefits shall have accrued prior to such discharge.

22. The Plan and Trust Agreement shall be read as an entirety, and anything contained in the latter shall be deemed a part of the Plan even though not contained herein.

23. The Administrative Committee shall annually furnish to each participant a statement of his or her account and shall furnish or make available at its New York office, a copy of the annual statement of the accountings of the Trustee. Any participant desiring to make objection thereto shall give written notice thereof to the committee within sixty (60) days after the date that a copy of either such statement is furnished or made available to such participant. Failure to object within such period shall bar any right thereafter to object to any of the accounts or proceedings covered by either such statement.

24. Discontinuance of the Plan and rights of participants upon discontinuance shall be governed by the following conditions:

(a) The Plan may be discontinued at any time upon recommendation of the Administrative Committee subject to the approval of the Board of Directors of J. C. Penney Company and of the stock-

Exhibit "X"—(Continued)

holders of the company. Announcement of the discontinuance shall be made at least six months before its effective date. On and after the date of such announcement, there shall be no contributions by either the company or by participants, except as otherwise provided in this article.

(b) As of the effective date of discontinuance, an amount for each participant shall be determined in accordance with the method prescribed under the terms of Article "10.B". There shall also be ascertained the ratio that the market value of assets then in the Fund (exclusive of any of the 200,000 shares of J. C. Penney Company common stock then remaining) bears to the book value of such assets, as shown on the accounts of the Fund after application of any reserves against depreciation of such assets. Each participant shall receive credit of an amount computed by applying the ratio so ascertained to the amount so determined under Article "10.B" as above.

(c) As of the effective date of such discontinuance, all shares then remaining in the Fund of the 200,000 shares of J. C. Penney Company common stock shall be considered as one block. From this block a number of shares for each participant shall be determined by the Administrative Committee, based upon the proportion that the participant's total contributions then in the Fund bears to the total of all participants' contributions then in the Fund, (with adjustment for fractional shares as determined by the Administrative Committee to be proper), except that the maximum number of shares

Exhibit "X"—(Continued)

for each participant shall not exceed 1,000. Any such excess of shares shall be proportionately allotted to other participants on the basis of contributions then in the Fund, subject to the 1,000 share maximum. In the event that excess shares above the maximum remain after allotment of 1,000 to each participant, the aggregate of such excess shall be equally allotted to all participants.

(d) The uncovered cost of all shares remaining of the 200,000 shares of J. C. Penney Company stock after application of any balance in the Reserve for Retirement or other reserves applicable as directed by the Administrative Committee to such shares, shall be determined. An amount representing the proportion of such uncovered cost shall be determined for the shares of stock allotted to each participant under "(c)" of this article, and any credit due to a participant as determined under "(b)" of this article shall be applied against such uncovered cost. If the credit for a participant under "(b)" equals or exceeds his or her uncovered cost under "(d)", such shares of stock and the balance of his or her credit, if any, shall be delivered to the participant subject to the provisions of Article "10.B(b)3". To the extent that the uncovered cost of a participant's shares is not covered by his or her credit, he or she shall be entitled at any time to pay such uncovered cost in cash, and such shares shall as of that date be delivered to the participant.

(e) If there remains uncovered cost for any participant not covered by credits or payments as provided in subdivision "(d)" of this article, then dis-

Exhibit "X"—(Continued)

tribution of the stock of such participant shall be deferred and future dividends shall be applied against the balance of such participant's uncovered cost. The company shall continue all contributions called for under the Plan, the total of which will be credited each year to the accounts of the remaining participants in the proportion that each participant's total contributions then in the Fund bears to all participants' contributions then in the Fund. At any time that any participant's share of such credits equals his or her portion of the uncovered cost, his or her shares of the stock shall be delivered to the participant. In any event, the company shall at the end of five years after the effective date of discontinuance, contribute an amount to the Fund sufficient to cover any balance of uncovered cost then remaining.

(f) In the discretion of the Administrative Committee, in order to safeguard the interests of all participants in the Fund, any amount due to participants under this article, other than J. C. Penney Company common stock, may be distributed in cash and/or securities of the Fund. The settlement value of any such securities shall be the market value as used in computations under this article.

25. Each participant in the Plan shall be required to sign a statement to the effect that he or she has read the terms of the Plan and the Trust Agreement, and that he or she understands the same. In accepting the terms of the Plan with the understanding that he or she will receive the benefits provided for thereunder, each participant authorizes the com-

Exhibit "X" — (Continued)

pany, or such person or persons as may be designated by it for the purpose, to administer the Plan and to do such acts as the company may deem necessary or advisable, to give effect to the provisions of the Plan and of the Trust Agreement.

Effective Dates:

The Plan is adopted effective as at January 1, 1940 except that:

(a) The requirement as to compulsory contributions of $33\frac{1}{3}\%$ of compensation shall apply to compensation paid covering any calendar year starting on or after January 1, 1940. However, any employee who participates in the Plan, and would have been eligible for the full year of 1939, if the Plan had been in effect during that period, or who would have been eligible for a portion of the year of 1939 and who had an approved leave of absence for the balance of that year shall have the privilege of contributing to the Fund, in accordance with instructions of the Administrative Committee, for credit to his or her account as at January 1, 1940 any amount up to $33\frac{1}{3}\%$ of compensation received for 1939 and paid in 1940. If $33\frac{1}{3}\%$ of 1939 compensation amounted to \$500.00 or less, then all of the participant's compensation up to \$500.00 may be contributed to the Fund. However, if any participant shall cease active employment prior to July 1, 1942, his or her own contribution to the Fund from 1939 compensation and other participants' contributions to the Fund from 1939 compensation shall not be used in measuring the number of shares of the J. C. Penney Com-

Exhibit "X" — (Continued)

pany common stock to which he or she is entitled in any retirement settlement.

EXHIBIT "A"

J. C. PENNEY COMPANY
PROFIT-SHARING RETIREMENT PLAN
(For Its Management Staff)

Agreement of Trust

Know All Men by These Presents, that

Whereas, J. C. Penney Company, a Delaware Corporation having its office at 330 West 34th Street, New York, N. Y. has adopted, effective as of January 1, 1940, a Profit-Sharing Retirement Plan for such of its employees as are eligible to participate under the terms of said Plan, which Plan may from time to time be altered, modified, or amended by the Company, subject to the restrictions hereinafter set forth, and is hereinafter referred to as "Plan", and

Whereas, a copy of this Agreement of Trust is attached to and made a part of said Plan; and

Whereas, funds must be contributed under said Plan by eligible employees of J. C. Penney Company (including eligible employees of wholly owned subsidiaries as defined in the Plan) and by J. C. Penney Company, which funds as and when contributed will constitute a Fund to be held for the benefit of said eligible employees under and in accordance with the Plan, and no part of which at any time will be used for or diverted to any other purpose except for paying such debts and liabilities of

Exhibit "A"—(Continued)

the Trustee, designated hereunder, as it shall incur under the terms and provisions of, or as permitted by, this Agreement of Trust and for defraying the actual expenses of administering the Plan and the Fund and,

Whereas, as a part of said Plan, J. C. Penney Company will issue, sell and deliver to the Trustee hereunder, Two Hundred Thousand (200,000) shares of its authorized unissued Common stock, upon payment by the Trustee to the Company of the sum of \$5,700,000, namely at the rate of Twenty-Eight and 50/100 (\$28.50) Dollars per share (being Thirty Dollars (\$30.00) per share less adjustment for two dividends of Seventy-Five Cents (\$.75) per share paid respectively on March 30, and June 29, 1940) which stock will be held by said Trustee under and in accordance with the terms and subject to the provisions of this Agreement of Trust, and

Whereas, in order to carry out the provisions of the Plan it is necessary that a Trustee be designated to hold, administer and disburse such funds and to acquire, hold and distribute such stock, and

Whereas, the Chase National Bank of the City of New York has agreed to act as the Trustee hereunder,

Now, Therefore, this Agreement of Trust, Witnesseth that it is hereby agreed by the Company, on its own behalf and on behalf of each person who now is, or hereafter becomes, a participant in, or now or hereafter has any interest under, the Plan, as follows:

First: As used herein:

Exhibit "A"—(Continued)

The word "Company" means J. C. Penney Company and its successors.

The word "Trustee" means The Chase National Bank of the City of New York, and any successor Trustee from time to time acting as Trustee hereunder.

The word "participant" means any person in the service of the Company or a wholly owned subsidiary as defined in the Plan, who shall be eligible to participate in the Plan under and in accordance with its terms, and shall also be construed to include the beneficiary or legal representative of a deceased participant.

The word "Fund" shall mean all moneys, whether principal or income, shares of J. C. Penney Company stock, or other securities or other property, at any time received or held by the Trustee hereunder.

The words "indebtedness of the Trustee" or "debts of the Trustee" or "liabilities of the Trustee", or any similar expression used in this Agreement of Trust, shall be deemed to include any note or other evidence of indebtedness executed by the Trustee, as Trustee under this Agreement of Trust, notwithstanding the fact that such Trustee will not be liable personally or individually for the indebtedness, liabilities or debts evidenced thereby. The words "creditor of the Trustee" or any similar expression shall be deemed to include the holder of any such note or other evidence of indebtedness.

Where reference is made herein to the 200,000 shares of J. C. Penney Company Common stock to be purchased by the Trustee from the Company, it

Exhibit "A"—(Continued)

is understood that, if the number of shares in the Trustee's hands at any time increases or decreases by reason of stock dividends, exercise of rights to purchase stock, or by reason of any expansion or contraction in the number of shares through recapitalization, merger or other change in capitalization of the Company, said 200,000 shares, or any part thereof in the hands of the Trustee at any time, shall be deemed to be increased or decreased proportionately as the result of the number of shares resulting from such adjustment. Any shares of stock or other securities, received by the Trustee, in addition to or in lieu of or in substitution for, or on account of, said 200,000 shares, shall be held by the Trustee on the same terms as said 200,000 shares.

Second: A. The Trustee shall act and shall be fully protected in acting hereunder in accordance with written instructions, directions or authorizations from the Company. The Company shall file with the Trustee a certified copy of resolutions of the Board of Directors of the Company, adopted from time to time, specifying the method or methods by which the Company shall give directions, instructions or authorizations to the Trustee under various provisions hereof.

B. The Company shall also have the right, by resolutions of the Board of Directors, to appoint an Administrative Committee to direct and manage the operation of the Plan. Upon the appointment of such Administrative Committee and until notice to the contrary has been received in writing by the Trustee from the Company, the Administrative

Exhibit "A"—(Continued)

Committee shall act for the Company in issuing written instructions, directions or authorizations to the Trustee. So long as an Administrative Committee shall be in existence, the term "Company" as used in this Agreement, shall mean the Company acting through the Administrative Committee.

C. In the event that any of the provisions of this Agreement of Trust shall be inconsistent with the provisions of said Plan, the provisions of this Agreement of Trust shall control.

Third: A. The Trustee from and after the first day of January, 1940 shall receive all contributions under the Plan, made by participants or by the Company, to be held, maintained, invested and applied by the Trustee in the manner, for the purposes, and to the extent hereinafter provided.

B. Moneys, received as contributions to the Fund from participants or from the Company, shall be received by the Trustee from the Company, and the Trustee shall not be responsible for the collection of any moneys from participants or from the Company, nor for the correctness of the amount of contributions from the Company or from participants paid over to it.

C. The Company shall promptly pay over to the Trustee, from time to time as received by or available to it, all such contributions made by participants or by the Company, whether heretofore or hereafter made.

Fourth: A. The trustee shall purchase forthwith, subject to the provision of Article Twenty-First, from J. C. Penney Company 200,000 shares

Exhibit "A"—(Continued)

of its authorized unissued Common stock for \$5,700,000, to be held and disposed of by the Trustee as in this agreement provided, subject to the receipt of sufficient moneys by means of a loan from Continental Illinois National Bank and Trust Company of Chicago pursuant to the direction of the Company.

B. The Trustee is authorized and empowered to borrow from Continental Illinois National Bank and Trust Company of Chicago (hereinafter referred to as the "Bank") the sum of \$5,700,000 to enable the Trustee to purchase said shares of stock, and to issue in connection with said borrowing the Trustee's promissory note or notes, as Trustee, and to pledge all of said shares of stock and other assets of the Fund as collateral, and to enter into and deliver a loan agreement with said Bank, all under any terms and provisions directed by the Company.

Inasmuch as it is hereinafter provided that moneys received by the Trustee from dividends, and from the Company's and participants' contributions under the Plan shall be paid to the Bank on account of payment of interest and principal of such loan and any additional loans by the Bank (excepting a sum not to exceed in the aggregate \$150,000), the Trustee, in order to provide for an additional fund required for payments to participants, for interest on or expenses in connection with such loans, taxes and the administration of the trust, is authorized to make additional loans from the Bank, providing that the aggregate principal amount of all loans from said Bank at any

Exhibit "A"—(Continued)

time outstanding (including the original loan and all such additional loans) shall never exceed \$5,700,000., or such lesser amount as shall be agreed upon in any note or loan agreement entered into between the Bank and the Trustee. The terms of such additional loans and loan agreements shall be such as are directed by the Company.

C. If any loan made as above specified is not paid in full upon maturity, and there are not sufficient moneys in the hands of the Trustee with which to pay the loan, the Trustee shall promptly advise the Company. The Trustee shall be under no duty to take any steps looking to the renewal or the replacement of the loan except in the manner and on the terms and conditions as directed by the Company. If the Company elects, it may make such advances on account of future contributions as may be necessary to secure a renewal or a replacement of the loan. The Company, however, shall, in the event that there shall be outstanding and unpaid any indebtedness of the Trustee to said Bank, have no right to make such advances on account of said future contributions to secure renewals or replacements of loans, unless the Company either (1) has the consent of said Bank or (2) such advances by the Company are made for the purpose of putting the Trustee in funds to be used to pay all such indebtedness in full and such funds are so used. Any advances so made, or made under B (3) or B (4) of Article Fifth shall be credited as directed by the Company. If the Company is not permitted hereunder or elects not to

Exhibit "A"—(Continued)

make such advances and if any or all of the stock pledged by the Trustee is sold by the creditor, there shall be no liability on the Trustee nor on the Company nor on any member of the Administrative Committee because of any loss to participants resulting from such sale.

All renewals or replacements of any loan at any time made by the Trustee shall be upon such conditions and be subject to such terms and provisions as may be directed by the Company, whether such conditions, terms or provisions shall be the same as or different from the loan renewed or replaced.

The Trustee shall likewise have authority to borrow sufficient moneys to pay in full before maturity all indebtedness of the Trustee to the Bank but shall be under no duty to take any steps looking to such payment of the indebtedness excepting at the request of, in the manner, and on the terms and conditions as directed by the company.

If all indebtedness to the Continental Illinois National Bank and Trust Company of Chicago shall be paid on or before maturity and such payment shall be made through the medium of a loan or loans from a lender or lenders other than the said Bank, then after all said indebtedness has been paid to said Bank and a loan or loans have been made by such other lender or lenders, the term 'Bank' as used in this Agreement of Trust shall thereafter be interpreted to mean such other lender or lenders, and all provisions in this Agreement of Trust wherein the term 'Bank' is used shall apply to said other lender or lenders with the

Exhibit "A"—(Continued)

same force and effect as they theretofore have applied to the Continental Illinois National Bank and Trust Company of Chicago.

The Trustee and the Company respectively shall perform and comply with all terms or provisions of any note evidencing, or loan agreement with respect to, any loan to the Trustee to the extent that such terms or provisions are applicable to the Trustee or Company.

D. Anything in the Plan or this Agreement of Trust to the contrary notwithstanding, except as hereafter provided in subparagraph E of this Article, the Trustee shall apply all cash dividends, received by it on the shares of J. C. Penney Company stock above referred to, as well as all other moneys received by it from J. C. Penney Company or from participants in the Plan, from time to time when and as received by it as follows:

First, the Trustee shall have the right to reserve from such moneys so received by it an amount, sufficient, in the judgment of the Trustee to pay interest on all outstanding indebtedness of the Trustee to the Bank, which will accrue up to and including the second quarterly interest payment date of loans by the Bank to the Trustee occurring after such receipt by the Trustee, and the Trustee shall, if such reservation is made, pay to the Bank when due the interest due on indebtedness to said Bank on such next two ensuing quarterly interest payment dates, and any excess of such amounts so reserved, which shall remain after the payment of such interest, shall be paid to said Bank and

Exhibit "A"—(Continued)

shall be applied on unpaid principal of such indebtedness, whether or not such principal shall then be due.

Second, any balance of such moneys, so received by the Trustee and not so reserved, shall be paid to said Bank, to be credited first on any then matured and unpaid interest and then on any unpaid principal of any such indebtedness of the Trustee to the Bank, regardless, in any case, of whether or not such principal shall then be due.

E. Notwithstanding the provision of subparagraph D, of this Article the Trustee shall, however, have the right to retain and withhold from payment to the Bank, at any time or times at which there shall be no existing default in payment of such indebtedness of the Trustee to the Bank, on account of either principal or interest of any indebtedness of the Trustee to the Bank, the aggregate sum of \$150,000.00 from the moneys received by it as dividends or contributions from the Company or from participants in the Plan, to be used for the same purposes as the additional loans from the Bank above provided for, such right of the Trustee shall, however, terminate from and after the time at which such aggregate sum shall have been so withheld, whether such withholding shall have been at one time or from time to time.

F. Anything in this Agreement of Trust or the Plan to the contrary notwithstanding however, the Company shall not amend or change any of the terms or provisions of this Agreement of Trust or said Plan which directly or indirectly affects any

Exhibit "A"—(Continued)

of the rights or benefits of the Bank without the consent in writing of the Bank, as long as there shall be any outstanding indebtedness or liabilities of the Trustee to the Bank in connection with its loans to the Trustee, except as may otherwise be provided in any evidence of indebtedness held by or loan agreement with the Bank.

G. The Company shall not consent to, or take any steps to accomplish, the termination or discontinuance of the Plan or this Agreement of Trust at any time at which there shall be any outstanding indebtedness or liabilities of the Trustee to the Bank in connection with its loans to the Trustee as herein provided.

H. The terms of any note, loan or loans or loan agreements to be made by the Trustee under Article Fourth hereof or under any other provision of this Agreement of Trust shall be in the form directed by the Company, and such terms are expressly consented to and shall be binding on all persons interested in this agreement as participants or otherwise. In the event that the terms and provisions of any note or loan agreement so executed by the Trustee shall be inconsistent with the provisions of the Plan or this Agreement of Trust, the provisions of such note or loan agreement shall govern. It is the intention hereof that the Trustee shall be fully protected in executing any note or loan agreement in the form directed by the Company.

I. All provisions of this Agreement of Trust which are for the benefit of the Bank shall inure

Exhibit "A"—(Continued)

also to the benefit of the holders of any indebtedness hereunder originally incurred by the Trustee to the Bank.

Fifth: A. Subject always to collateral purposes in connection with any loan and to the rights of pledgees:

The Trustee shall at all times retain the J. C. Penney Company Common stock for distribution to participants as directed by the Company from time to time, and, upon such directions being given, the Trustee shall take the necessary steps to have the requisite number of shares transferred into the name of the participant for delivery. All expenses in connection with such transfers shall be a charge against the Fund. The Board of Directors of the Company, if in its discretion economic conditions make it advisable, shall, however, have the power to direct the Trustee to sell all or any part of the 200,000 shares. Upon receipt of a certified copy of a resolution to such effect, the Trustee shall, as soon as it is able so to do, follow the directions therein contained. If any such sale of stock is made, the proceeds shall be considered, for the purposes of the Plan, as constituting a substitution for the stock sold, and the proceeds shall be invested or otherwise disposed of as directed in writing by the Company under and in accordance with the general purposes of the Plan. Such investments may be made in stocks, either common or preferred, bonds, notes or other evidences of indebtedness or other securities even though the same may not be legal investments for trustees

Exhibit "A"—(Continued)

under the laws applicable hereto. Such proceeds together with any moneys held by the Trustee under subparagraph B(4) of Article Fifth and the investments and reinvestments thereof shall be held as a separate fund hereunder unless the Board of Directors should direct the Trustee to consolidate such fund with the other investments held hereunder.

B. The trustee shall, subject always to collateral purposes in connection with any loan and to the rights of pledgees, have the following additional powers with respect to the shares of J. C. Penney Company Common stock purchased by it as provided in this agreement:

(1) The Trustee is authorized but not directed to vote the shares of stock or to otherwise consent to or request any action on the part of the Company and to give general or special proxies or powers of attorney with or without power of substitution.

(2) To receive any stock dividends, which when received shall become a portion of the stock in the Fund and shall be added to and treated as forming a part of the original 200,000 shares.

(3) If the Company in connection with the 200,000 shares of J. C. Penney Company stock shall issue rights to purchase additional stock, and at the time of the issuance of such rights there is any unpaid indebtedness to the Bank, the Trustee shall have the following power and authority:

a. If the Company shall notify the Trustee and the Bank that the Company deems it advisable to

Exhibit "A"—(Continued)

exercise all such rights and if the Bank shall agree that it is advisable to exercise such rights and shall within five days from the receipt of such notice, either make an additional loan to the Trustee upon terms and conditions directed by the Company, sufficient with which to enable it to exercise such rights, or shall within the same length of time by agreement with the Company grant it the right to make advances upon its future contributions to be used for the purpose of exercising such rights, and the Company shall make such advances, the Trustee shall exercise such rights, otherwise it shall sell such rights.

b. If the Company shall notify the Trustee and the Bank that it deems it advisable to sell all rights issued in connection with such stock, the Trustee shall sell such rights in the event that the Bank does not within five days after the receipt of such notice, loan to the Trustee upon terms and conditions directed by the Company, a sufficient sum of money to enable the Trustee to exercise such rights. In the event that such loan is made by the Bank to the Trustee, the Trustee shall exercise such rights.

c. If the Company shall notify the Trustee and the Bank that it desires the Trustee to sell a sufficient number of said rights so that the Trustee may be able to exercise the rights with respect to the balance of the stock, the Trustee shall sell such number of rights in order to exercise the rights with reference to the balance of the stock in the event that the Bank does not within five days after

Exhibit "A"—(Continued)

the receipt of such notice loan to the Trustee, on terms and conditions directed by the Company, a sum of money sufficient with which to exercise all such rights. In the event that such loan is made by the Bank to the Trustee, the Trustee shall exercise such rights.

d. If the Company shall fail to notify the Trustee and the Bank whether it deems it advisable to exercise such rights, to sell such rights, or to exercise such rights in part and sell such rights in part, within fifteen days prior to the last date for the exercise of such rights, the Trustee shall sell such rights at such time prior to the expiration date as it deems advisable.

e. If any loan is made by the Bank to the Trustee as provided in subparagraphs a, b, and c immediately above set forth, the Trustee shall have full power and authority to issue its note to evidence such loan and to execute any loan agreement in connection therewith, the terms and provisions of any such note or loan agreement to be as directed by the Company.

f. All stock received by the Trustee as a result of the exercise of the rights shall be pledged with the Bank as a part of the collateral securing any indebtedness from the Trustee to the Bank, and the proceeds of all rights which are sold, shall be paid over by the Trustee to the Bank and shall be applied by it first against any matured and unpaid interest and the balance against the principal of any indebtedness from the Trustee to the Bank, whether or not then due.

Exhibit "A"—(Continued)

g. Any stock so purchased through the exercise of rights shall be added to and treated as a part of the original 200,000 shares.

h. The rights of the Bank and the duties of the Trustee in connection with any loans, made under the provisions of Article Fifth B (3) shall be the same as with respect to other loans made by the Bank to the Trustee as set forth in this agreement except as otherwise provided in any note or notes, or loan agreement or loan agreements executed by the Trustee in connection with such loan or loans.

(4) If the Company in connection with the 200,000 shares of J. C. Penney Company common stock shall issue rights to purchase stock and at the time of issuance of such rights there is no unpaid indebtedness to the Bank, the Trustee shall have the following power and authority.

a. If the Company shall notify the Trustee at least fifteen days prior to the final date set for the exercise of the rights, that it deems it advisable to sell all rights issued in connection with such stock, the Trustee shall sell such rights at such date prior to the final date set for the exercise of the rights as it shall deem advisable.

b. If the Company shall fail to notify the Trustee as provided in subparagraph a immediately above set forth, the Trustee shall exercise the rights to purchase additional stock out of moneys in its hands, which stock when purchased shall be added to and treated as forming a part of the original 200,000 shares. If it does not have sufficient moneys with which to purchase such stock, it shall forth-

Exhibit "A"—(Continued)

with notify the Company in writing and the Company shall have the right within five days thereafter to notify the Trustee that it will advance a sufficient sum of money on account of its future contributions to enable the Trustee to exercise its rights to purchase such stock. In the event of such notification the Company agrees to advance such moneys prior to the final date upon which such rights can be exercised. If within such five day period the Company shall either advise the Trustee that it will not make such advances or shall fail to advise the Trustee that it will make such advances, the Trustee will borrow sufficient funds with which to exercise such rights issuing its promissory note or notes as Trustee as evidence of such indebtedness and using the J. C. Penney Company stock or other securities as collateral. If the Trustee is unable to borrow a sufficient sum with which to exercise all or any part of such rights, it shall have the right to sell the rights or sell a portion of the rights and use the funds received from such balance together with any moneys then in its hands to exercise the balance of such rights.

c. Any moneys received from the sale of rights and not used to purchase stock through exercise of rights shall be held by the Trustee in lieu of the stock and shall be invested or otherwise disposed of as directed in writing by the Company under and in accordance with the general purposes of the Plan. Such investments may be made in stocks, either common or preferred, bonds, notes or other evidences of indebtedness or other securi-

Exhibit "A"—(Continued)

ties even though the same may not be legal investments for trustees under the laws applicable hereto. As set forth in subparagraph A of Article Fifth such moneys together with any proceeds of sale under said subparagraph A of Article Fifth and the investments and reinvestments thereof shall be held as a separate fund hereunder unless the Board of Directors should direct the Trustee to consolidate such fund with the other investments held hereunder.

(5) The Trustee shall have the right to participate in reorganizations, recapitalizations, mergers and similar transactions with respect to such stock and to hold the stock or other securities with re-a result thereof, in lieu of the stock relinquished in such transaction and/or in conjunction with, the balance of the 200,000 shares of the J. C. Penney Company stock then remaining in its hands.

(6) The trustee shall transfer, assign and deliver to any creditor, who holds as collateral for its loan, all or any portion of the said 200,000 shares of J. C. Penney Company stock, any additional or substituted shares of stock or other securities, received by the Trustee as a stock dividend or through the exercise of rights to purchase additional stock, or received by the Trustee, by virtue of the provisions of subparagraph (5) of this Article Fifth, to be held by such creditor as collateral for its loan, and shall pay over to such creditor any cash similarly received.

Exhibit "A"—(Continued)

Sixth: A. The Trustee shall manage the Fund. It shall invest and reinvest the Fund, provided, however, that no funds in the hands of the Trustee shall be invested or reinvested without the consent of the Bank until all loans to the Trustee by said Bank shall have been paid in full. The Trustee shall at all times have as its primary purpose the conservation of the principal of the Fund. For this reason the Trustee (except in so far as it uses or reserves moneys received or earned to pay in full or on account any loans to or liabilities or debts of the Trustee) shall be limited in its investments and reinvestments to securities issued by the United States of America and to securities issued by any governmental agency of the United States of America, the payment of principal and interest of which is unqualifiedly guaranteed by the United States of America. The maturity date of any security so purchased shall not be later than ten (10) years after the date of the purchase of the particular security. Within this limitation, and subject to the provisions of subparagraph D of Article Fourth, the Trustee shall have full power and authority to purchase, sell and exchange, invest and reinvest any and all moneys, securities or other property from time to time comprising the Fund, including income earned on the Fund. The Board of Directors of the Company, by notice in writing, may at any time amend this subparagraph so as to alter in any manner the limitations upon the class of securities in which the Fund may be invested and reinvested and, in the event of such an amend-

Exhibit "A"—(Continued)

ment, the Trustee shall, as to investments and re-investments made thereafter, be subject to the amended limitations specified by the Board of Directors of the Company.

B. Subject to the provision of subparagraph D of Article Fourth, the Trustee shall have full power to reserve from investment and keep unproductive of income any amounts or parts of the Fund as it may at any and all times deem advisable.

C. The provisions of this Article Sixth shall not apply to the 200,000 shares of J. C. Penney Company stock, special provisions for which are made in Articles Fourth and Fifth hereof, but shall apply to the cash dividends received on said stock, subject, however, to the provisions of subparagraph D of said Article Fourth.

Seventh: Subject to the rights of any creditor of the Trustee to whom it is indebted for money borrowed hereunder and to the provisions of subparagraph D of Article Fourth hereof, the Trustee upon receiving written directions from the Company shall from time to time make deliveries to it of shares of stock from the 200,000 shares of J. C. Penney Company stock transferred into the names of and for distribution by the Company to participants entitled thereto and shall likewise make payments and other disbursements out of the Fund. Checks or other vouchers for such payments shall be made payable to such persons (including in the term "persons", insurance companies in connection with the purchase of annuities and life insurance policies and corporations named by participants as

Exhibit "A"—(Continued)

beneficiaries) at such times, in such manner and in such amounts as may be specified in the written directions of the Company, and shall be delivered by the Trustee to the Company for distribution by the Company under and in accordance with the terms of the Plan. Upon such payments or disbursements being made, the amount thereof shall no longer constitute a part of the Fund hereunder. All such payments or disbursements shall be made from principal or income without distinction.

Eight: The Trustee shall have the following further duties and powers:

A. After any initial loan by the Bank, made in connection with the purchase of the 200,000 shares of J. C. Penney Company Common Stock, and any additional loans, by the Bank, shall have been paid in full, or at any earlier date if the Bank shall consent, the Trustee, in its discretion, shall have power to borrow money in such amounts and upon such terms and conditions as it shall deem advisable or proper to carry out the purposes of the trust, or to pay off then existing indebtedness of the Trustee, and for sums so borrowed, to issue its promissory note or notes as Trustee, and to secure the payment thereof by pledging all or any part of the Fund. Any interest paid by the Trustee in respect of any such loans shall be a charge against the Fund.

B. The Trustee may, with the approval of the Company, take and hold any security or other property constituting a part of the Fund in bearer form or in its own name or in the name of its nominee

Exhibit "A"—(Continued)

or nominees without disclosing its fiduciary capacity. The name of the nominee or nominees shall be disclosed by the Trustee to the Company at its request.

C. The Trustee may employ suitable agents and counsel and pay therefor reasonable compensation and expenses.

D. If at any time the Company shall be incapable for any reason of giving directions, instructions or authorizations to the Trustee as herein provided for, the Trustee may act and shall be protected in acting (except in selling all or any part of the 200,000 shares of J. C. Penney Company Common Stock), without such directions, instructions or authorizations, as the Trustee in its discretion deems appropriate and advisable under the circumstances for the carrying out of the provisions of this Trust.

E. The Trustee shall file with the Company on or before March 1st of each year, a statement of its accounts and proceedings during the next preceding calendar year. In the absence of any exception thereto filed in writing with the Trustee by the Company within a period of ninety days after its receipt, such statement shall constitute a final accounting by and discharge of the Trustee, with respect to such accounts and proceedings, and shall be binding and conclusive upon the Company and upon all employees or persons having or claiming an interest in the Fund other than the Bank. No person having an interest in the Fund, other than

Exhibit "A"—(Continued)

the Bank, shall have the right to demand any further or different accounting by the Trustee.

Ninth: A. The Trustee shall be paid such reasonable compensation, as shall from time to time be agreed upon in writing by the Company and the Trustee, together with its expenses. The Company shall determine each year whether said compensation and expenses shall be paid by it or shall constitute a charge against the Fund. It shall advise the Trustee of its determination and in any year in which the compensation and expenses of the Trustee are not paid by the Company, the Trustee shall pay the same to itself out of the Fund. All personal property taxes, income taxes, and other taxes of any and all kinds whatsoever which may be levied or assessed under existing or future laws, upon or in respect of the Trust hereby created, or the Fund or any securities, moneys, or other property forming a part thereof, which are not paid by the Company to the Trustee upon its receiving notice from the Trustee of the levy or assessment of such taxes, shall be charged by the Trustee to the Fund and paid by it from the Fund. The Trustee may assume that any taxes assessed on or in respect of the Fund concerning the levy and assessment of which it has notified the Company are lawfully assessed unless the Company shall in writing advise the Trustee that in the opinion of counsel for the Company, such taxes are unlawfully assessed. In the event that the Company shall so advise the Trustee, the Trustee will, if so requested in writing by the Company, contest the validity of

Exhibit "A"—(Continued)

such taxes in any manner deemed appropriate by it or its counsel, or the Company if it so elects, may itself contest the validity of any such taxes in any manner deemed by it to be appropriate. The expenses of contesting any tax shall be considered as an actual expense of administering the Fund and the provisions of subdivision B of this Article Ninth shall be applicable thereto. The word "taxes" as used in this section shall be deemed to include any interest or penalties that may be levied or imposed in respect of any taxes lawfully assessed.

B. If in any year during which any loan or loans by the Bank to the Trustee are outstanding and unpaid, there shall be no moneys available or which can be made available under the provisions of this agreement or under the terms of any evidence of indebtedness or loan agreement, to pay such compensation, expenses and taxes, the Company agrees to pay to the Trustee a sufficient sum to pay to it such compensation and to reimburse it for such expenses and taxes paid by the Trustee. After the loan or loans above mentioned shall have been paid in full, the Trustee will if requested in writing by the Company, repay to it out of moneys in the Fund all or any part of the moneys advanced by the Company as above provided, providing that such request is made within 12 months after such loan or loans shall have been paid in full.

C. Each year the Company shall determine how much of its actual expenses of administering the Fund shall be borne by the Company and how much of said administrative expenses shall be borne

Exhibit "A"—(Continued)

by the Fund. As to all such expenses which the Company determines shall be borne by the Fund, the Trustee shall reimburse the Company upon written request. No request for such reimbursement shall be made by the Company for administrative expenses incurred more than twelve months prior to the commencement of the calendar year in which such request is made. The Trustee is released from any obligation for inquiring into the correctness of the amount of such expenses.

D. If at the time such request is made, there is an outstanding loan or loans to the Bank and there shall be no moneys available or which can be made available under the provisions of this agreement or under the provisions of any evidence of indebtedness or loan agreement with which to reimburse the Company, such reimbursement shall be deferred until such loan or loans shall have been paid in full, at which time such reimbursement shall be made by the Trustee to the Company out of moneys in the Fund.

E. The terms "moneys available or which can be made available" as used in subparagraphs B. and D. of this Article Ninth and in Article Tenth shall mean moneys in the hands of the Trustee other than moneys which are the proceeds of dividends from J. C. Penney Company stock or contributions from the Company or participants.

Tenth: The Trustee may be removed by the Company at any time upon sixty days' written notice to the Trustee. The Trustee may resign at any time upon sixty days' written notice to the

Exhibit "A"—(Continued)

Company. Upon the expiration of sixty days after service by the Company upon the Trustee of notice of its removal, or upon the expiration of sixty days after service by the Trustee upon the Company of notice of its resignation, all the duties and obligations of the Trustee hereunder, except those specified in this Article Tenth, shall cease. The appointment of a successor trustee shall be made by the Board of Directors of the Company within such sixty-day period. So long as any indebtedness remains outstanding and unpaid to the Bank, any successor trustee hereunder shall be a corporation authorized to accept and execute trusts under the laws of the United States of America, or of the State in which it is incorporated and having a capital and surplus, as shown by its last preceding published report, of at least \$2,000,000. Upon the removal or resignation of the Trustee becoming effective or at such earlier date as may be agreed upon, the Trustee shall convey, transfer and pay over to such successor trustee as shall be designated in writing by the Company, the Fund then constituting the Trust hereunder, providing, however, that such successor trustee shall take said assets subject to any indebtedness and agreements of and pledges by the Trustee then outstanding. It is further provided that if there is no indebtedness to the Bank outstanding and unpaid at the time when such removal or resignation becomes effective, the Trustee is authorized first to reserve such sum of money or property as to it may seem advisable for the payment of its expenses in connection with the

Exhibit "A"—(Continued)

settlement of its account or otherwise and any balance of such reserve remaining after the payment of such expenses shall be paid over to the successor trustee. If at the date when such removal or resignation of the Trustee becomes effective, there shall be any indebtedness to the Bank outstanding and unpaid, and the moneys in the hands of the Trustee available or which can be made available under the provisions of this Agreement or of any evidence of indebtedness or loan agreement shall not be sufficient with which to enable the Trustee to retain all or any part of such reserve, the Trustee shall only have the right to retain towards its reserve any moneys which are available or can be made available under the terms of this Agreement and in lieu of retaining the balance of the reserve as above provided for, shall have the right to require the Company to advance to it the balance of such sum of money as to it may seem advisable for the payment of its expenses in connection with the settlement of its account or otherwise, and the Company agrees to advance to the Trustee such sum of money, and any balance of such reserve remaining after the payment of such expenses shall be repaid to the Company. The removal or resignation of the Trustee shall not become effective until such payment has been made to the Trustee by the Company. The Trustee, upon the removal or resignation becoming effective shall forthwith file with the Company a statement of its accounts and proceedings from the date of the last day of the

Exhibit "A"—(Continued)

period covered by its last preceding account to the effective date of its resignation or removal.

Eleventh: A. Neither the Trustee nor the Company nor any member of the Administrative Committee at any time acting for or on behalf of the Company shall be liable hereunder to participants in the Plan in any respect except for its or his own gross negligence or willful misconduct, and neither the Trustee nor the Company nor any such person shall be liable for any neglect, omission or wrongdoing of any agents employed by them provided reasonable care shall have been exercised in their selection.

B. The Trustee shall not be liable for the proper application to participants in the Plan of any part of the Fund if deliveries of shares of J. C. Penney Company stock and payments from the Fund are made in accordance with the written direction of the Company as herein provided, nor shall the Trustee nor the Company nor any member of the Administrative Committee acting for or on behalf of the Company be responsible for the adequacy of the Fund to meet and discharge any and all payments and liabilities under the Plan.

C. The Trustee shall be fully protected in acting upon any instrument, certificate or paper believed by it to be genuine and to be signed or presented by the proper person or persons and the Trustee shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing, but may accept the same as conclusive

Exhibit "A"—(Continued)

evidence of the truth and accuracy of the statements therein contained.

Twelfth: All persons dealing with the Trustee are released from inquiring into the decisions or authority of the Trustee and from seeing to the application of any shares of stock, securities, moneys or other property paid or delivered to the Trustee.

Thirteenth: In any application to the courts, only the J. C. Penney Company, (not the Administrative Committee), the Trustee and the Bank, while any loan from the Bank to the Trustee remains unpaid, shall be necessary parties and no participant shall be entitled to any notice or process. Any final judgment entered in such an action or proceeding shall be conclusive upon all persons claiming under the Plan or Trust.

Fourteenth: No benefit deliverable, transferable or payable to a participant under the provisions of the Plan, shall be subject in any manner to anticipation, assignment, pledge or charge by any participant in the Plan, and any attempt so to anticipate, assign, pledge, or charge the same shall be void; nor shall any such benefit be in any manner liable for or subject to the debts, contracts, liabilities, or torts of any participant, nor shall any interest of any participant, under the Plan be subject to garnishment, attachment, execution or levy of any kind, except to such extent as may be required by law.

Fifteenth: A. The Trust shall continue until terminated or until the Fund hereunder shall have

Exhibit "A"—(Continued)

been paid out or delivered or distributed in accordance with the provisions hereof. The Company (subject to the provisions of subparagraph F Article Fourth), reserves the right at any time or times by action of the Board of Directors to alter, modify or amend in whole or in part, any or all of the provisions hereof or (subject to the provisions of subparagraph G of Article Fourth) in its discretion at any time, as provided in the Plan, to terminate this trust in whole or in part, provided, however, that under such alteration, modification, amendment or termination, no part of the Fund in the possession of the Trustee, excepting so much of the moneys for which the Company may be reimbursed for expenses of operation of the Plan, shall ever revert to the Company or be diverted to or used for any purposes other than for the exclusive benefit of participants covered by the Plan, but subject always to the rights of creditors of the Trustee, and provided further, that no such alteration, modification or amendment of the provisions hereof shall impose additional duties on the Trustee without its consent.

B. In the event of the termination of this Trust the Fund shall be paid out, delivered and distributed by the Trustee in accordance with directions received by it from the Company but subject always to the rights of creditors of the Trustee; provided further, however, that the Trustee is authorized, subject always, however, to the rights of the Bank, first, to reserve such sum of money or property as to it may seem advisable for the pay-

Exhibit "A"—(Continued)

ment of its expenses in connection with the settlement of its account or otherwise, and any balance of such reserve remaining after the payment of such expenses shall be paid out, distributed and delivered by the Trustee in accordance with directions received by it from the Company.

Sixteenth: All moneys, stock, securities and other property comprising the Fund in the hands of the Trustee shall be subject to any indebtedness owing by the Trustee to the Bank, and said Bank shall have a first and paramount lien upon, and right to be paid out of, the Fund as from time to time constituted, and so long as any part of said indebtedness remains unpaid, no part of the Fund shall be paid or distributed to any one other than said Bank, except that, from time to time so long as there is no default in the payment of any indebtedness of the Trustee to said Bank, (1) a sum or sums not exceeding \$150,000.00 in the aggregate, received by the Trustee from dividends or from contributions of the Company and participants, and a sum or sums not exceeding \$500,000.00 in the aggregate, received by the Trustee as an additional loan or additional loans from said Bank may be distributed or used to pay expenses in connection with the administration of this trust or in connection with any loan or loans from the Bank and (2) an aggregate of not to exceed 10,000 shares of the J. C. Penney Company Common stock, when and if released from the pledge thereof to the Bank, may be distributed to retiring participants.

Seventeenth: The Company represents and de-

Exhibit "A"—(Continued)

clares that the Bank has notice of the terms and provisions of this Agreement of Trust and that the original loan by said Bank is made in part in reliance upon such terms and provisions. The Company agrees that the fact that said Bank has notice of the terms of the Plan shall not in any way affect any of said Bank's rights under this Agreement of Trust, or the notes or loan agreements in connection with the original or future loans by the Bank to the Trustee, whether or not any of the latter three instruments shall be inconsistent with the Plan.

Eighteenth: The Trustee hereby agrees to hold in trust and administer the Fund hereunder subject to all of the terms and conditions hereof.

Nineteenth: This instrument shall be construed and enforced according to the laws of the State of New York, and all the provisions thereof shall be administered according to the laws of said State.

Twentieth: J. C. Penney Company executes this Agreement of Trust, and joins therein, to evidence its consent to the terms and provisions thereof and its agreement to perform the matters and things therein provided to be performed by it.

Twenty-First: This agreement shall be and become effective when and if, within six months after the date of execution hereof, the 200,000 shares of J. C. Penney Company common stock herein referred to shall have been approved for listing on the New York Stock Exchange and the registration thereof under the Securities Exchange Act of 1934

Exhibit "A"—(Continued)

shall have become effective; and otherwise shall be void and of no effect.

In Witness Whereof, this instrument has been executed at New York, N. Y., on the 8th day of July, 1940, effective as of the first day of January, 1940, by J. C. Penney Company, and its corporate seal affixed and attached by its officers thereunto duly authorized and by The Chase National Bank of the City of New York, as Trustee, and its corporate seal affixed and attested by its officers thereunto duly authorized.

(Corporate Seal)

J. C. PENNEY COMPANY

By A. W. HUGHES,
Vice-President

Attest:

A. J. RASKOPF
Secretary

(Corporate Seal)

THE CHASE NATIONAL
BANK OF THE CITY
OF NEW YORK

By W. L. HILDEBURN,
Vice-President

Attest:

E. B. GARDNER
Asst. Trust Officer

Exhibit "A"—(Continued)

State of New York

County of New York—ss.

On this 8th day of July, 1940, before me personally came A. W. Hughes, to me known, who being by me duly sworn, did depose and say: That he resides in New Rochelle, N. Y.; that he is the Vice-President of J. C. Penney Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed to said instrument by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Notary Public, Nassau County No. 501, Certificate filed in New York County Number 535, New York County Register's Number G 334, Commission expires March 30, 1941.

[Seal]

C. W. GEISLER

State of New York

County of New York—ss.

On this 8th day of July, 1940, before me personally came W. L. Hildeburn, to me known, who being by me duly sworn, did depose and say: That he resides in Summit, N. J.; that he is a Vice-President of The Chase National Bank of the City of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument in such corporate seal;

Exhibit "A"—Continued)

that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Notary Public, Nassau County No. 1044, Certificate filed in New York County No. 159, Register's No. 1-N-90, Commission expires March 30, 1940.

[Seal]

WALTER S. NELSON

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

First Defense

The complaint fails to state a claim against this answering defendant upon which relief can be granted.

Second Defense

I.

Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 1, 3, 4, 5, 7, 8, 9 and 10.

II.

Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 2, except it admits that it is a national banking association organized

under the laws of the United States of America, having its principal office and place of business in the City and State of New York, and that the complaint purports to allege a matter in controversy in excess of \$3,000, exclusive of interest and costs, and admits, on information and belief, that defendant J. C. Penney Company is a corporation incorporated under the laws of the State of Delaware.

III.

Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 6, except it admits that on or about July 8, 1940, it entered into an agreement of trust with defendant J. C. Penney Company, copy of which (with minor typographical corrections) is attached to the complaint as Exhibit A (herein called the "Trust Agreement"), and admits, on information and belief, that on or about March 21, 1940, the stockholders approved and adopted the Profit-Sharing Retirement Plan, (herein called the "Plan"), copy of which is attached to the complaint as Exhibit X.

IV.

Denies each and every allegation contained in paragraph 11, except it admits that on or about August 1, 1940, as Trustee under the Trust Agreement, it bought from defendant J. C. Penney Company 200,000 shares of J. C. Penney Company stock with the entire proceeds of a loan for

\$5,700,000 from Continental Illinois National Bank and Trust Company of Chicago, and that on or about August 8, 1945, in accordance with the terms of settlement of an action instituted by a stockholder of defendant J. C. Penney Company and judicially compromised, defendant The Chase National Bank of the City of New York, as Trustee, paid out of the fund of the Plan an additional \$300,000 towards the purchase price of the 200,000 shares.

V.

Denies each and every allegation contained in paragraph 12, except it admits that on or about January 16, 1946, by reason of a stock split it received two additional shares of J. C. Penney stock for each share held under the Trust Agreement, and that upon receipt of said additional shares it held 578,511 shares of said stock.

VI.

Denies each and every allegation contained in paragraphs 13 and 17, except it refers to the Plan and the Trust Agreement for the terms and provisions thereof.

VII.

Denies each and every allegation contained in paragraphs 14, 15, 16, 18, 19 and 21.

VIII.

Denies each and every allegation contained in paragraph 20, except it admits that it, in conform-

ity with the Trust Agreement, upon receiving written directions from defendant J. C. Penney Company, from time to time made deliveries to defendant J. C. Penney Company of shares of stock transferred into individual names, and admits that it holds at the present date pursuant to the Trust Agreement approximately 519,901 shares of stock of J. C. Penney Company of a present approximate market value of \$34,508,428.88 as of the close of business August 9, 1951.

Third Defense

I.

All present participants in the Plan are indispensable parties.

II.

Plaintiffs have failed to join indispensable parties.

Wherefore, defendant The Chase National Bank of the City of New York demands judgment dismissing the complaint with costs.

/s/ KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ CLARENCE J. YOUNG,

/s/ ANDREW KOERNER,

Attorneys for defendant The Chase National Bank
of the City of New York.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 30, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT J. C. PENNEY
COMPANY

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Present members of the management staff of the defendant J. C. Penney Company who are participants in the Profit-Sharing Retirement Plan referred to in the complaint numbering approximately 1,800 would be adversely affected by the relief sought in the complaint and are indispensable parties to this action and have not been joined as parties.

Third Defense

1. Denies each and every allegation contained in paragraph 1 of the complaint, except admits that plaintiffs bring this action on behalf of themselves, and alleges that the former management staff employees of J. C. Penney Company who were participants in the Profit-Sharing Retirement Plan referred to in the complaint and who did not attain retirement status thereunder number approximately 700.

2. Admits the allegations contained in paragraphs 2, 3, 4 and 5 of the complaint.

3. Denies each and every allegation contained in

paragraph 6 of the complaint except alleges that on March 21, 1940 at the annual meeting of the stockholders of J. C. Penney Company duly called and held, the stockholders approved and adopted the J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff) (hereinafter sometimes referred to as the Retirement Plan or the Plan) which had been approved by the Board of Directors on December 6, 1939, and further alleges that on or about July 8, 1940 J. C. Penney Company entered into an agreement of trust with the defendant The Chase National Bank of the City of New York, and that the Plan and Trust Agreement, in the form annexed to plaintiff's complaint as Exhibit X and A, were distributed to the eligible members of the management staff of J. C. Penney Company including the plaintiffs on or about July 25, 1940, and that the Retirement Plan became operative, in accordance with its terms, as of January 1, 1940, and further alleges that each eligible member of the management staff of J. C. Penney Company upon becoming a participant in said Plan, including the plaintiff Wells and the plaintiff Albertsen, signed a "Participant's Acceptance Form", true copies of said forms signed by plaintiff Wells and by plaintiff Albertsen being annexed hereto as Exhibit A and Exhibit B, respectively, and further alleges that the Plan was duly amended from time to time by the Board of Directors of the Company, and that a true copy of the

Plan as so amended and as in effect when this action was commenced, is annexed hereto as Exhibit C.

4. Denies each and every allegation contained in paragraph 7 of the complaint, except alleges that approximately 1,725 management staff associates were participants in the Plan at the end of 1940, and further alleges that the Retirement Plan was one of the defendant J. C. Penney Company's incentive plans for its employees.

5. Admits the allegations contained in paragraphs 8 and 9 of the complaint, except alleges that plaintiff Albertsen also made a contribution for the year 1950 in the sum of \$2,356.22, and further alleges that all contributions made by the plaintiff Wells and by the plaintiff Albertsen represented a percentage of their profit sharing compensation consisting of a portion of the profits of the respective stores managed by them (known as Manager's Contract Compensation) and were made in accordance with the terms of the Retirement Plan.

6. Denies each and every allegation contained in paragraph 10 of the complaint, except alleges that former participants in the Retirement Plan made contributions in accordance with the terms of the Plan which were paid over to the defendant, The Chase National Bank of the City of New York, as trustee under said Plan, and that such contributions in the case of each participant who was a store manager represented a percentage of his profit sharing compensation consisting of a portion of the profits of the store managed by him (known as

Manager's Contract Compensation) and that such contributions in the case of each participant who was a central or branch office employee represented a percentage of such participant's profit sharing compensation based on the Company's profits as a whole under the Company's General Office Compensation Plan.

7. Denies each and every allegation contained in paragraph 11 of the complaint, except alleges that on or about August 1, 1940, the Company sold to the defendant, The Chase National Bank of the City of New York, as Trustee under the Agreement of Trust, a copy of which is annexed to plaintiff's complaint as Exhibit A, 200,000 shares of its authorized and unissued stock for \$5,700,000, being \$30 per share (the approximate January 1, 1940, per share book value of the Company's outstanding stock) less adjustment for two dividends of 75c per share each, paid between January 1, 1940 and August 1, 1940 on the Company's outstanding stock; that the quoted price of J. C. Penney Company common stock on August 1, 1940, traded on the New York Stock Exchange, was \$80 per share; that the Company received the \$5,700,000 from the Trustee for the 200,000 shares of stock from the proceeds of a loan in that amount made by the Trustee from Continental Illinois National Bank & Trust Company of Chicago; that on or about August 8, 1945, in accordance with the terms of the settlement of an action instituted by a stockholder of the Company and judicially compromised, the

Company received from the Trustee of the Fund under the Plan an additional \$300,000 toward the purchase price of the 200,000 shares, representing the aforesaid adjustment for dividends in the purchase price, and the payment of such \$300,000 from the Fund by the Trustee was charged against the dividend account of the Fund of the Plan.

8. Denies each and every allegation contained in paragraph 12 of the complaint except alleges that in 1946 J. C. Penney Company stock was split 3 for 1 and on January 16, 1946 there were issued to each stockholder, including the Trustee of the Plan, two additional shares for each share held with the result that beginning with the Plan's operations for 1946, as provided in Article 6 of the Plan, each reference in the Plan and Trust Agreement to a number of shares of stock is to be read as though stated in the increased number of shares resulting from the split-up, and that The Chase National Bank of the City of New York as Trustee of the Plan held, immediately following the issuance on January 16, 1946, 578,511 shares of stock of J. C. Penney Company.

9. Denies each and every allegation contained in paragraph 13 of the complaint except alleges that, pursuant to the terms of the Retirement Plan, the Company has made and makes annual contributions of two types to the Fund under the Plan, one contribution, based on the profits of the Company, being credited to the accounts of the participants, and the other, which is an amount equal to 2% of

the salaries of employees receiving compensation as defined in the Plan, being applied toward the cost of the shares of J. C. Penney Company stock purchased by the Trustee of the Plan, and that the plaintiffs and each of the other participants in the Plan upon leaving the employ of the Company received all the benefits due them under the terms of the Plan.

10. Denies each and every allegation contained in paragraphs 14, 15, 16, 17, 18 and 19 of the complaint.

11. Denies each and every allegation contained in paragraph 20 of the complaint except alleges that the defendant The Chase National Bank of the City of New York has from time to time during the period from July 1, 1945 to date at the direction of the Administrative Committee of the Plan made deliveries of stock from the shares of J. C. Penney Company stock held by it as trustee under the Plan to participants entitled thereto under the terms of the Plan by reason of having served in the employ of the Company to retirement age of 60, and further alleges that the defendant The Chase National Bank of the City of New York as trustee under the Plan has in its possession 519,901 shares of J. C. Penney Company stock, and further alleges that on the 12th day of July, 1951, the date on which the complaint in this action was served, the quoted closing price of J. C. Penney Company stock on the New York Stock Exchange was \$68.25 per share.

12. Denies each and every allegation contained in paragraph 21 of the complaint.

Fourth Defense

The United States Treasury Department on or about November 12, 1940 issued a ruling that the Plan met the requirements of Section 165 of the Internal Revenue Code and therefore qualified as an employees' trust entitled to exemption from Federal income tax, a true copy of which ruling is annexed hereto as Exhibit D. Subsequent to the amendment of said Section 165 by the Revenue Act of 1942 the Treasury Department on or about December 21, 1944 issued a ruling that the Plan met the requirements of Section 165(a) of the Internal Revenue Code as amended and therefore qualified as an employees' trust entitled to exemption from Federal income tax, a true copy of which ruling is annexed hereto as Exhibit E. The Treasury Department has also determined that amendments to the Plan submitted to it from time to time did not affect the Plan's continued qualification as an employees' trust entitled to exemption from Federal income tax under Section 165(a) of the Internal Revenue Code, as amended.

Fifth Defense

The claims of plaintiffs Wells and Albertsen and all others whom they purport to represent are barred by estoppel.

ing retirement status, whose contributions and earnings were used in the acquisition of the J. C. Penney Company stock purported to be held in trust by the Trustee.

Plaintiffs contend "that the trust purported to be established with respect to the shares of J. C. Penney Company stock is illegal and void in that the same constituted, with respect to such stock, a lottery. Plaintiffs pray that all such shares of stock which are held by the Trustee at the time of the entry of a decree in this action be declared to be held under a resulting trust in favor of plaintiffs and those for whom plaintiffs have instituted this action whose contributions and earnings were used in the acquisition of and payment for such shares of stock; and also plaintiffs contend that such decree should provide that a resulting trust exists in favor of participants now in the Plan whose funds were used in the acquisition and payment for said shares of stock the respective interests of all such persons, being the plaintiffs and those for whom they prosecute this action and such other present participants, to be in the proportion that the contributions and earnings of each such person bear to the total contributions and earnings of all such persons which were used in the acquisition and payment for said shares of stock."

Defendants deny that plaintiffs are entitled to any relief and assert the validity of the Plan and Trust.

For the purposes of brevity and convenience, the

following are generally referred to in this Pre-Trial Order in the following manner:

A. Defendant J. C. Penney Company is referred to as "Penney Company."

B. Defendant The Chase National Bank of the City of New York is referred to as "Chase Bank."

C. Continental Illinois National Bank and Trust Company of Chicago is referred to as "Continental Bank."

D. (1) J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff) as distributed to participants in 1940 is set forth on pages 21 to 36, both inclusive, of Ex. 125, and as amended from time to time is referred to as the "Profit-Sharing Retirement Plan" or "Plan." The Trust Agreement forming part of the Plan, as adopted in 1940, is set forth on pages 37 to 50, both inclusive, of Ex. 125, and as amended from time to time is referred to as the "Trust Agreement."

(2) The term "compensation" as used in said Plan is defined on page 21 of Ex. 125, as follows:

"The term 'compensation' as used herein means the amount received by an employee of J. C. Penney Company under contract as a portion of the profits of the store managed by him, or the amount received by a central or branch office employee as his or her share of the General Office Compensation Fund, as the case may be, and excludes regular salary. If so determined by the Administrative Committee, it may also include other compensation than that specified above, apart from regular salary, based on

profits received by employees of J. C. Penney Company."

(3) The term "participant" as used in said Plan and in this Pre-trial Order means the eligible employees specified in Article 3 of said Plan on page 24 of Ex. 125, as follows:

"the following classes of employees of the Company and of any wholly owned subsidiary shall be eligible to participate in the Plan:

store managers and central and branch office employees who have a contract entitling them to receive compensation as hereinbefore defined, which includes store managers, buyers, employees holding positions of responsibility in the central and branch offices of the company, and executives, including those who are directors, but excluding those who serve as directors only. It shall also include employees holding positions of responsibility in any wholly owned subsidiary determined by the Administrative Committee to be eligible. It shall also include any other classes of employees entitled to receive compensation who may be determined by the Administrative Committee at any time to be eligible.****"

E. J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff) Administrative Committee is referred to as "Administrative Committee."

F. Stockholders of J. C. Penney Company are referred to as "Stockholders."

G. Directors of J. C. Penney Company are referred to as "Directors."

H. The term "associate" as used by the Penney Company has the same meaning as the term "employee."

Stipulation Re Statement of Agreed Facts

The matters set forth in this Statement of Agreed Facts are agreed by all parties to be true and shall be considered as evidence for all purposes; and wherever in this Statement of Agreed Facts reference is made to an exhibit, such exhibit in its entirety is to be considered a part of the Statement of Agreed Facts and shall be considered as evidence for all purposes; provided, however, that any of such facts and any of such exhibits shall be subject to any objection upon the ground of irrelevance or immateriality which any party may set forth in this Pre-trial Order, or assert at the trial and that this Statement of Agreed Facts shall not constitute a bar to any party's urging any legal contention made by such party in this Pre-trial Order, and provided further that where an exhibit heretofore mentioned is to be considered as evidence for all purposes, such circumstance shall not bar the right of any party to urge in this Pre-trial Order or assert at the trial that only a portion or portions of such exhibit or exhibits are relevant or material.

Statement of Agreed Facts

1.

Plaintiff Harvey L. Wells is, and at the time of instituting this action was, a citizen of the United States and a citizen and resident of the State of Oregon.

2.

Plaintiff Harry J. Albertsen is, and at the time of instituting this action was, a citizen of the United States and a citizen and resident of the State of California.

3.

Defendant Penney Company is, and at all times since 1924 has been, a corporation organized and existing under the laws of the State of Delaware.

4.

Defendant Chase Bank is, and at all times herein referred to has been, a national banking association organized and existing under the laws of the United States of America, having its principal office and place of business in the City and State of New York.

5.

The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

6.

Continental Bank is, and at all times herein referred to has been, a national banking association

organized and existing under the laws of the United States of America, having its principal office and place of business in the City of Chicago, State of Illinois.

7.

The business of the Penney Company consists and has consisted of the distribution at retail of wearing apparel for men, women and children, and of dry goods and home furnishings at low and medium prices through a chain of stores situated throughout the United States. At the end of 1948, the last year plaintiff Wells was employed by the Penney Company, it had 1,601 stores located in small, medium and large size communities in the 48 states, each store being managed by one associate. At the end of 1950, the last full calendar year plaintiff Albertsen was employed by the Penney Company, it had 1,612 stores. At the end of 1953 the Penney Company had a total of 1,634 stores located in the 48 states, of which 42 stores were located in the State of Oregon.

8.

The Penney Company is the outgrowth of one small store opened in 1902 in Kemmerer, Wyoming, by James C. Penney, who is presently Chairman of the Board of Directors. The business was conducted through a group of affiliated partnerships until January 16, 1913, when a Utah corporation named J. C. Penney Company was formed which took over the business of and became the successor to this group of affiliated partnerships. The defend-

ant Penney Company was incorporated under the laws of the State of Delaware on December 24, 1924, and on January 1, 1925, it took over the business of and became the successor to the Utah corporation. Since 1914 the executive offices of the Penney Company and its predecessor company have been in and are now in New York City.

9.

J. C. Penney Company, the Utah corporation organized in 1913, succeeded to the assets and assumed the obligations of the previous partnerships. The stock which was issued by that corporation was termed "classified stock," a separate class of stock having been issued for each store. Each former partner received in place of his partnership interest in a store an equivalent portion of the Utah corporation's classified stock relating to that store which entitled him to profits resulting from the store's operations, payable in dividends, as declared by the corporation. In 1919 preferred stock of the Utah corporation was issued to the public and listed on the New York Stock Exchange.

When J. C. Penney Company, the Delaware corporation, was incorporated, classified stock interests of the Utah corporation were reissued in the form of classified stock of the Delaware corporation. Managers continued to hold this classified stock. Provision was made in the Delaware corporation's charter for the conversion of the classified stock interests of persons other than Store Managers into

the Delaware corporation unclassified common stock and Class A preferred stock (in 1927 termed common stock and preferred stock, respectively), the conversion to take place as the stores for which the classified stock was issued qualified on the basis of earnings, or in any event by not later than December 31, 1931. The Class A preferred stock was retired by 1935. First preferred stock of the Delaware corporation, retired by 1927, was also issued in place of the preferred stock of the Utah corporation.

At a stockholders' meeting held on February 21, 1927, a resolution providing for amendments to the Certificate of Incorporation was adopted by the unanimous vote of all common stockholders, present in person or by proxy (Ex. 161).

The amendments to the Certificate of Incorporation provided in substance for the conversion of the classified common stock held by managers. All such stock owned by a manager, except the stock of the store which he managed, was converted into common stock and preferred stock. For the classified common stock owned by a manager in the store managed by him a manager received preferred stock equal in value to the value of capital and surplus applicable to his classified shares, and a contract, known as a "Manager's Conversion Contract," entitling him to the same proportion of his store's earnings to which he was entitled under his classified common stock, and the right to purchase at book value, on ceasing to manage his store, common stock which, on the basis of its previous

year's earnings, would earn for him two-thirds of the preceding three-year average earning power under his contract.

In 1929 the Company's Certificate of Incorporation was amended to provide for the calling in of all outstanding Manager's Conversion Contracts and for each manager, on surrendering his contract, to purchase at its book value a number of shares of common stock of the Company as though he had given up the management of his store on December 31, 1928. All conversion contracts were so surrendered.

Commencing with 1929, the Company has issued to each manager a contract entitling him to a specified percentage of the yearly profits his store produces.

At the stockholders' meeting of February 21, 1927, provision was made for the setting up of a general office compensation plan under which, since 1927, executives, buyers and others holding responsible positions in the central and branch offices of the Company have received profit-sharing remuneration based on the profits of the Company as a whole.

In accordance with the action taken at the above mentioned stockholders' meeting, managers and central and branch office associates who qualified were permitted to invest in common stock of the Company when offered for sale by the Company for expansion purposes. Such sales were made in the years 1927, 1928, 1929, 1930 and 1937. In 1935 the Company sold to eligible associates shares of

its common stock which it had acquired on the market in previous years and had held in its treasury.

Sales of stock of the Company were also made in 1925 and 1926 to eligible associates of the Company.

These sales made in the years 1925, 1926, 1927, 1928, 1929, 1930, 1935 and 1937 were in the actual number of shares set out below in the second column opposite the year and which shares for years prior to 1930 would represent in 1940 the number of shares of the present stock set out below in the third column opposite the year:

Year	Actual Shares Sold	Shares Adjusted to 1940 Stock
1925	2,120	63,600
1926	1,190	35,700
1927	18,538	55,614
1928	20,110	60,330
1929	18,607	55,821
1930	49,207	49,207
1935	40,000	40,000
1937	75,000	75,000

10.

In 1927 the common stock of the Penney Company was split ten for one by issuing to the holder of record of each share of common stock ten shares in return for each share held.

In 1929 the Company issued warrants giving each holder of record of its common stock the right to purchase for each share held two additional shares at \$7 per share.

In 1945 the common stock of the Company was split three for one and accordingly on January 16,

1946 there were issued to each stockholder of record two additional shares for each share held. As a result, the Trustee of the Plan thereupon held 578,511 shares of stock of the Company and beginning with the Plan's operations for 1946, as provided in Article 6 of the Plan, each reference in the Plan and Trust Agreement to a number of shares of stock is to be read as though stated in the increased number of shares resulting from the split-up. The number of shares held by the Trustee on December 31, 1953 was 483,754.

11.

The connections with Penney Company and its predecessors of the persons who since 1939 have served as officers or directors are as follows:

J. C. Penney:

Founded business in 1902

Elected Director, President and General Manager upon incorporation of company in Utah in 1913 and Chairman of the Board in 1917

Elected Director and Chairman of Board when Delaware corporation succeeded Utah corporation January 1, 1925

Honorary Chairman of Board 1946-1951

Chairman of Board 1951-

Earl C. Sams:

Started with company in 1907

Director of Utah corporation 1913-1925

First Vice President 1913-1917

President 1917-1924

Elected Director and President when Delaware corporation succeeded Utah corporation January 1, 1925

Member Operating Committee from January 1, 1943, to April 20, 1946

President until 1946 when elected Chairman of Board, served in that capacity until death on July 23, 1950

John I. H. Herbert:

Started with company in 1911

Director and Treasurer of Utah corporation 1913-1924

Secretary 1913-1917

Elected Director and Treasurer when Delaware corporation succeeded Utah corporation January 1, 1925

Third Vice President 1926-1945

Retired under Retirement Plan as Third Vice President and Treasurer July 1, 1945

Continues to serve as Director

Member Operating Committee from January 1, 1943, to July 1, 1945

Member Administrative Committee from inception of Plan to July 1, 1945

George H. Bushnell:

Started with company in 1911

Director of Utah corporation 1916-1924

Assistant Secretary and Assistant Treasurer 1917-1920

First Vice President and Comptroller 1920-1924

Elected Director, First Vice President and Comptroller when Delaware corporation succeeded Utah corporation January 1, 1925

Resigned Comptrollership in 1926, First Vice Presidency in 1930 and as Director July 1, 1947

Wilk Hyer:

Started with company in 1910

Director of Utah corporation 1918-1924

Vice President 1918-1920

Elected Director when Delaware corporation succeeded Utah corporation January 1, 1925

Resigned as Head of Shoe Department in July 1929

Continues to serve as Director

Lew V. Day:

Started with company in 1912

Elected Director in 1926

Appointed Head of Personnel Department in 1927

Elected First Vice President in 1930

Resigned as Head of Personnel and First Vice President June 30, 1937, and as Director November 27, 1945

Glyndon H. Crocker:

Started with company in 1920 as Director and General Manager of a wholly owned subsidiary, Crescent Corset Company, Inc.

Elected President of Crescent Corset Company, Inc., on June 3, 1930

Elected Director of parent company in 1926

Served in these capacities until his death on August 2, 1945

Walter A. Reynolds:

Started with company in 1923

Appointed Sales Manager in 1929

Elected Director and Second Vice President in 1930, Executive Vice President in 1946

Retired under Retirement Plan as Sales Manager and Executive Vice President on July 1, 1947, and resigned as Director on that date

Member Operating Committee from January 1, 1943, until July 1, 1947.

Earl A. Ross:

Started with company in 1916

Appointed Real Estate Manager in 1928

Elected Director in 1930

Retired under Retirement Plan as Real Estate Manager July 1, 1945

Continues to serve as Director

Member Operating Committee from January 1, 1943, to July 1, 1945

Albert W. Hughes:

Started with company in 1920

Appointed Assistant to the President in 1929

Elected Director in 1933

Elected Vice President and appointed Head of Personnel Department in 1937

Gave up duties as Head of Personnel Department in 1940

Elected Executive Vice President in 1943, President in 1946

Reached retirement status under Retirement Plan on July 1, 1951

Continues to serve as President and Director

Member Operating Committee from January 1, 1943, to present time

Member Administrative Committee from inception of Plan to April 20, 1953

Frederick W. Binzen:

Started with company in 1926

Appointed Merchandise Manager in 1929

Elected Director in 1935

Elected Third Vice President in 1945, Second Vice President in 1946 and Executive Vice President in 1947

Retired under Retirement Plan as Executive Vice President and Merchandise Manager on July 1, 1950

Continues to serve as Director

Member Operating Committee from January 1, 1943, to July 1, 1950

Member Administrative Committee from inception of Plan to July 1, 1950

Frederick A. Bantz:

Started with company in 1922

Elected Director November 27, 1945

Elected Vice President and appointed Merchandise Manager on July 1, 1950

Presently serving in above capacities

Member Operating Committee since July 1, 1950

Member Administrative Committee since July 1, 1950

John F. Brown:

Started with company in 1921

Elected Director November 27, 1945

Appointed Real Estate Manager July 1, 1945

Elected Third Vice President July 1, 1947, and Vice President July 1, 1950

Presently serving as Director, Vice President and Real Estate Manager

Member Operating Committee since July 1, 1945

George E. Mack:

Started with company in 1921

Elected Treasurer July 1, 1945, and Third Vice President in 1946

Elected Director and Second Vice President July 1, 1947, and Executive Vice President July 1, 1950.

Presently serving as Director, Executive Vice President and Treasurer

Member Operating Committee since July 1, 1945

Member Administrative Committee since July 1, 1945

Herbert H. Schwamb:

Started with company in 1923

Appointed Head of Personnel Department in 1940

Elected Director July 1, 1947, and Vice President July 1, 1950

Member Operating Committee since January 1, 1943, to present time

Member Administrative Committee from inception of Plan to present time

Presently serving in above capacities

Homer F. Torrey:

Started with company in 1919

Appointed Sales Manager July 1, 1947

Elected Vice President July 1, 1950

Elected Director December 5, 1950

Member Operating Committee since July 1, 1947

Presently serving in above capacities.

August J. Raskopf:

Started with company in 1919

Elected Secretary January 1, 1932 and serves in that capacity

Never a Director

Richard W. Trown:

Started with company in 1914

Elected Comptroller in 1929

Resigned as Comptroller November 30, 1945

Member Operating Committee from January 1, 1943, to November 30, 1945

Member Administrative Committee from inception of Plan until November 30, 1945

Never a Director

Died December 15, 1951

Robert C. Weiderman:

Started with company in 1916

Elected Comptroller November 30, 1945, and serves in that capacity

Member Operating Committee from December 1945

Member Administrative Committee since December 3, 1945

Never a Director

12.

On March 10, 1930, the stockholders adopted, with reference to the Operating Committee of the Penney Company, Article XIX of the By-Laws as set forth on the first page of Ex. 156, which continued in effect until September 2, 1942. On September 2, 1942, the Directors amended said Article XIX of the By-Laws so as to read as set forth on the second page of Ex. 156, and as so amended said Article XIX continued in effect after said date.

13.

During each of the following years the following persons were members of and served as members of the Operating Committee, and, if a change occurred during such year, such member was succeeded on the date stated by the person set out in the note below such year:

Members of Operating Committee

Year 1943: E. C. Sams, J. I. H. Herbert, W. A. Reynolds, E. A. Ross, A. W. Hughes, F. W. Binzen, R. W. Trown and H. H. Schwamb.

Year 1944: Same as 1943.

Year 1945: Same as 1943. Note: On July 1, 1945,

J. F. Brown succeeded E. A. Ross and George E. Mack succeeded J. I. H. Herbert; and in December, 1945 R. C. Weiderman succeeded R. W. Trown.

Year 1946: E. C. Sams (until April 20), A. W. Hughes, W. A. Reynolds, F. W. Binzen, George E. Mack, H. H. Schwamb, J. F. Brown and R. C. Weiderman.

Year 1947: A. W. Hughes, W. A. Reynolds, F. W. Binzen, George E. Mack, H. H. Schwamb, J. F. Brown and R. C. Weiderman. Note: As of July 1, 1947, W. A. Reynolds retired and was succeeded by H. F. Torrey.

Year 1947: A. W. Hughes, F. W. Binzen, George E. Mack, H. H. Schwamb, J. F. Brown, R. C. Weiderman and H. F. Torrey.

Year 1949: Same as 1948.

Year 1950: Same as 1948. Note: F. W. Binzen retired as of July 1, 1950, and was succeeded by F. A. Bantz.

Year 1951: A. W. Hughes, George E. Mack, H. H. Schwamb, J. F. Brown, R. C. Weiderman, H. F. Torrey and F. A. Bantz.

14.

At their meeting held on December 5 and 6, 1939, the Directors elected the following persons to serve as members of the Administrative Committee: J. I. H. Herbert, F. W. Binzen, R. W. Trown, A. W. Hughes and H. H. Schwamb.

Said persons continued to serve until July 1, 1945, when George E. Mack was appointed by the

Directors to succeed J. I. H. Herbert who retired under the Plan on that date.

Said persons served as such until December 3, 1945, when the Directors appointed R. C. Weiderman to succeed R. W. Trown who had resigned as Comptroller.

Said persons continued to serve until July 1, 1950, when F. A. Bantz was appointed to succeed F. W. Binzen who retired under the Plan on that date.

Said persons continued to serve thereafter except that on April 20, 1953, W. M. Batten was appointed to succeed A. W. Hughes who resigned on that date.

15.

The stockholders of defendant Penney Company at the annual stockholders meetings held on the dates shown below elected the persons whose names appear opposite the date of such meeting as directors, and such persons served as directors until the next annual stockholders meeting, unless otherwise stated in a note below the date of such meeting; and, if a vacancy is stated in such note to have occurred, such vacancy did occur, and the person stated in such note to have been elected to fill the vacancy was so elected, and the vacancy was filled by the election of the successor as therein stated, and such successor served as a director until the next annual meeting of the stockholders.

Date of Annual Stockholders Meeting: March 21, 1939. Directors Elected: J. C. Penney, E. C. Sams, J. I. H. Herbert, George H. Bushnell, Wilk Hyer,

G. H. Crocker, Lew V. Day, W. A. Reynolds, A. W. Hughes, Earl A. Ross and F. W. Binzen.

March 21, 1940: Same persons as elected in 1939.

April 20, 1941: Same persons as elected in 1939.

April 20, 1942: Same persons as elected in 1939.

April 20, 1943: Same persons as elected in 1939.

April 20, 1944: Same persons as elected in 1939.

April 20, 1945: Same persons as elected in 1939.

Note: On November 27, 1945, F. A. Bantz and J. F. Brown were elected directors for the unexpired terms of G. H. Crocker who died on August 2, 1945, and Lew V. Day who resigned on November 27, 1945.

April 20, 1946: J. C. Penney, E. C. Sams, J. I. H. Herbert, George H. Bushnell, Wilk Hyer, W. A. Reynolds, Earl A. Ross, A. W. Hughes, F. W. Binzen, F. A. Bantz and J. F. Brown.

April 21, 1947: Same persons as elected in 1946.
Note: George E. Mack and H. H. Schwamb were elected directors on June 17, 1947, for the unexpired terms of George H. Bushnell and W. A. Reynolds who resigned as directors as of July 1, 1947.

April 20, 1948: J. C. Penney, E. C. Sams, J. I. H. Herbert, Wilk Hyer, Earl A. Ross, A. W. Hughes, F. W. Binzen, F. A. Bantz, J. F. Brown, George E. Mack and H. H. Schwamb.

April 20, 1949: Same persons as elected in 1948.

April 20, 1950: Same persons as elected in 1948.

Note: H. F. Torrey was elected a director on De-

cember 5, 1950, to fill the unexpired term of E. C. Sams who died on July 23, 1950.

April 20, 1951: J. C. Penney, J. I. H. Herbert, Wilk Hyer, Earl A. Ross, A. W. Hughes, F. W. Binzen, F. A. Bantz, J. F. Brown, George E. Mack, H. H. Schwamb and H. F. Torrey.

16.

Plaintiff Harvey L. Wells was with the Penney Company from 1919 to 1923, when he left its employment. He rejoined the Company in 1929 as a section head in Portland store No. 217, until he was appointed manager of Portland Store No. 499 in 1933. In 1935 he was transferred from Store No. 499 to become manager of the Streator, Illinois, store, where he remained until 1944. In 1944 he became manager of the Corvallis, Oregon, store.

Plaintiff Harry J. Albertsen entered the employ of Penney Company in 1925 as a salesman in the Taft, California, store, where he remained until the fall of 1926, when he became a salesman in the new Hanford, California, store. He remained in that capacity until October, 1930, when he was made manager of the Van Nuys, California, store No. 525. On July 1, 1934, he became manager of East Los Angeles store No. 925, continuing in that capacity until he was discharged effective December 31, 1950.

17.

On or about November 24, 1939, R. W. Trown, then Comptroller of Penney Company, submitted

to the directors a communication and attachments (Ex. 123) with reference to the establishment of a profit-sharing retirement plan. Said communication and attachments were considered by the directors at their meeting held on December 5 and 6, 1939.

18.

At a meeting held on December 5 and 6, 1939, the Board of Directors of the Penney Company adopted the Profit-Sharing Retirement Plan subject to approval of the stockholders of the Company and to its completion in final form (Ex. 2).

19.

Under date of December 26, 1939 Penney Company caused to be mailed to managers and central and branch office executives, including plaintiffs, a letter of E. C. Sams, then President of the Company, (Ex. 128) as follows:

“President’s Office
New York, N. Y.
December 26, 1939.

“To the Managers and Central Office Executives:

“As you all know, it has been the unwritten policy of our company occasionally, when circumstances seemed to warrant it, to issue shares of its common stock to eligible executives and store managers. The number of shares, the price, and the time of issuance, depended in a general way on the development of the company. The purpose of that policy was to create incentive through ownership

participation in the profits of the company and, also, to assist participants in building for themselves and their families a security against advanced age and often its incidental dependency. It is questioned by the company's Board whether that policy in recent years has met the purposes intended.

“The Board feels strongly however, that the advisability of attaining the purposes mentioned still exists. It recognizes that ownership participation has played a part in the development of our company. It also believes that distinct benefit will be gained to associates and to the company by assisting associates in building a security against old age dependence. This is being widely recognized in all competitive fields because of the growing need for making room on management staffs for younger associates who may contribute quicker recognition and faster development of new and modern merchandising techniques.

“Accordingly, a profit-sharing and retirement plan has been devised after much thought and study, which it is believed in large measure will in time meet the situation. This plan has been considered and approved by the Board of Directors. The adoption of the plan, however, is strictly subject to the stockholders' approval, which cannot be obtained before the next annual meeting, March 21, 1940.

“If the plan is adopted, it will become operative as at January 1, 1940. The plan provides, among

other things, for withholding a 20% portion of compensation due to all managers and central and branch office executives in any year. This will become part of the manager's and executive's savings under the plan. The company will also make certain contributions to the fund set up under the terms of the plan. While the plan does not require withholding of compensation until earnings for 1940 are due, which would ordinarily be paid early in 1941, it will permit deposits up to one-third of 1939, compensation payable early in 1940. In those cases where one-third of compensation is less than \$500.00, deposit privilege will be extended permitting deposit from compensation to \$500.00. In other words, managers may voluntarily deposit from their 1939 compensation, but there will be no compulsion as to any deposit until the 1940 compensation is paid, early in 1941.

"The plan, if adopted, will not cover any associates other than store managers with contracts and general office associates included in the General Office Compensation Fund. Therefore, men approved as 'ready-to-manage', and participants in 'large' store pools, will not be included under this plan.

"This makes it necessary to revise all managers' contracts as of December 31, 1939. You will be advised about your 1940 contract just as soon as possible after the stockholders' decision is known. This brief information about the new plan, coming to you now, will permit you to arrange your personal affairs, taking into consideration the possible adop-

tion of the plan and subsequent reduction in your immediate cash income from compensation. Furthermore, we feel sure that when you finally have an opportunity to go over the details of the plan you will recognize that its liberality will make it highly profitable for you to voluntarily deposit a portion of your compensation for 1939.

“Full information regarding the details of the plan will be made available to you when all legal points as to its adoption can be worked out.

“I am indeed happy to be able to advise you of this step. For years we have been seeking a better and more constructive way by which the managers and executives of today and tomorrow might share in the development of this company. Now, after a year of intensive study, a plan has been developed that appears not only sound from the viewpoint of the stockholder but exceedingly attractive to every man in the management group. I am so enthusiastic about the new plan that it seems to me 1939 will take its place as one of the greatest years in our company's history. In my judgment, through the adoption of the ‘Thrift’ plan for associates outside the management group, and through the development of this plan for managers and executives, we have added new strength to the Penney Company and paved the way for even greater progress in the years ahead.

Sincerely,
E. C. Sams”

20.

On or about February 24, 1940, there was mailed to managers and central and branch office associates a letter of E. C. Sams, then President of the Company, (Ex. 244) enclosing the associate's check for his 1939 compensation, advising that if the profit-sharing retirement plan was approved by stockholders, eligible participants would be privileged to deposit up to one-third of their 1939 compensation, and asking the associate to return a check for such portion of the amount of the enclosed check as he wished to deposit. Plaintiffs received counterparts of this letter.

21.

On or about February 29, 1940, there was mailed to each stockholder of the Penney Company, including the plaintiffs, a document (Ex. 55) consisting of a letter of E. C. Sams, then President of the Penney Company, a notice of the annual meeting to be held on March 21, 1940 and a proxy statement containing a summary of the Retirement Plan. The purpose of the meeting was to elect directors and to consider and vote upon the approval and adoption of the Retirement Plan.

22.

Plaintiff Wells executed and returned to the Company the proxy (Ex. 245) sent to him with Ex. 55 conferring authority upon his proxies to vote for approval and adoption of the proposed Retirement Plan. Plaintiff Albertsen did not return his proxy.

23.

The annual meeting of the stockholders was held on March 21, 1940. At said meeting there was presented a copy of said Plan in its then form (Ex. 1-A). At the meeting the stockholders adopted resolutions approving and adopting the Plan effective as of January 1, 1940 (Ex. 1). Plaintiff Wells' shares were voted for such approval and adoption. The Plan has been continuously in effect since the date of its adoption.

24.

In the proxy statement for the annual meeting of the stockholders on March 21, 1940 (Ex. 55), it was stated that upon their approval and adoption of the proposed Plan it was the intention of the Board of Directors to adopt for the salaried employees of the Company the retirement policy set forth in the proxy statement and such retirement policy was adopted by the Board of Directors by resolution on April 23, 1940 (p. 1322 of Ex. 3), and was included as Article 8 of the Plan (pp. 27-28 of Ex. 125).

25.

In the form in which the Plan was adopted by the stockholders (Ex. 1-A) a participant was required to contribute 20% of his compensation for each year beginning with the year 1940 and was permitted to contribute up to 33 $\frac{1}{3}$ %. On May 28, 1940 the Board of Directors of the Penney Company adopted a resolution amending the Plan so that each participant was required to contribute 33 $\frac{1}{3}$ % of his compensa-

tion for each year beginning with the year 1940 (Ex. 4).

26.

On July 8, 1940 the Board of Directors of the Penney Company adopted a resolution approving the Plan with changes made since its meeting of December 5 and 6, 1939, and approving and authorizing the execution of the agreement of trust to be entered into with the Chase Bank as Trustee of the Plan (Ex. 7). On the same date the Trust Agreement was entered into by the Penney Company and the Chase Bank as Trustee (pp. 37-50 of Ex. 125), and the Chase Bank has at all times since July 1940 acted as Trustee under the Plan. The Plan and Trust Agreement, as so approved and entered into, are set forth on pp. 21-50 of Ex. 125. At all times herein concerned, the trust property which is the subject of this action and the place of administration of the trust and of the Plan have been and are now located in the city, county and state of New York.

27.

A. On August 1, 1940, in accordance with the provisions of the Plan and Trust Agreement, the Penney Company sold to the Chase Bank, as Trustee of the Retirement Plan, 200,000 shares of its authorized and unissued stock and delivered certificates for the 200,000 shares to the Chase Bank. The Chase Bank, as Trustee, paid the Penney Company on the same day the purchase price of \$5,700,000, which was at the rate of \$28.50 per share, being \$30 per

share (the approximate January 1, 1940, per share book value of the Company's outstanding stock) less adjustment for two dividends of 75c each paid between January 1, 1940 and August 1, 1940. The purchase price of \$5,700,000 was paid with the proceeds of a loan in the sum of \$5,700,000 made by the Continental Illinois National Bank & Trust Company of Chicago to the Chase Bank as Trustee of the Retirement Plan to enable the Chase Bank to purchase the stock. The loan was made pursuant to an agreement executed by the Continental Bank, the Chase Bank as Trustee, and the Penney Company (Ex. 210), and a note evidencing the loan was executed by the Chase Bank as Trustee (Ex. 211), (Article 5 of the Plan, p. 24 of Ex. 125; Article Fourth of the Trust Agreement, pp. 39-41 of Ex. 125). On or about August 8, 1945, in accordance with the terms of the settlement of an action instituted by a stockholder of the Company and judicially compromised, the Company received from the Trustee of the Fund under the Plan \$300,000 as an addition to the purchase price of \$5,700,000 paid for the 200,000 shares, representing the aforesaid adjustment for dividends in the purchase price, and the payment of such \$300,000 from the Fund by the Trustee was charged against the dividend account of the Fund of the Plan (pp. 1559-63 of Ex. 23).

B. The following shows the closing prices of J. C. Penney Company stock upon the New York Stock Exchange upon the dates stated (the stock being split 3 for 1 on January 16, 1946):

	Date	Price
Jan. 1 a	12/30/39	94 $\frac{1}{2}$
holiday	1/2/40	94 $\frac{1}{2}$
	8/1/40	80
	3/1/41	76 $\frac{3}{4}$
March 1 a	2/28/42	68 $\frac{3}{4}$
holiday	3/2/42	68 $\frac{1}{4}$
	3/1/43	84 $\frac{1}{2}$
	3/1/44	96 $\frac{3}{4}$
	3/1/45	111
	3/1/46	53$\frac{1}{2}$
	3/1/47	43 $\frac{7}{8}$
	3/1/48	37 $\frac{7}{8}$
	3/1/49	44 $\frac{7}{8}$
	3/1/50	60 $\frac{1}{2}$
	3/1/51	70
	3/1/52	68 $\frac{3}{8}$
March 1 a	2/27/53	68 $\frac{7}{8}$
Sunday	3/2/53	68

C. The following shows the "high" and "low" prices at which J. C. Penney Company common stock was quoted on the New York Stock Exchange for each month during the period August 1, 1940 through December 31, 1953:

**Record of Monthly 'High' and 'Low' Sales Prices* of
J. C. Penney Company Common Stock on New York Stock
Exchange for Months of August 1940 through December 1953**

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<u>Jan.</u>	<u>Feb.</u>	<u>Mar.</u>	<u>Apr.</u>	<u>May</u>	<u>June</u>	<u>July</u>	<u>Aug.</u>	<u>Sept.</u>	<u>Oct.</u>	<u>Nov.</u>	<u>Dec.</u>
							84 78	92 84	92 89	91 87	90 83
87	82	81	81	84	81	84	88	89	88	84	81
80	75	77	78	78	79	80	83	86	81	76	73
81	71	69	67	66	67	70	72	75	75	75	82
66	67	61	57	57	65	67	69	72	72	73	75
82	85	87	91	90	98	100	99	100	99	97	99
80	82	83	87	87	89	96	95	98	93	90	90
97	97	100	100	100	103	105	107	107	110	113	113
94	94	97	97	99	100	100	104	102	106	106	108
110	112	111	114	123	122	120	122	130	138	152	152
108	109	106	109	114	117	117	118	121	124	137	147
159											
149											
58	58	57	58	58	57	53	51	51	49	48	47
52	53	51	53	54	49	49	50	46	44	40	41
48	48	45	44	42	44	48	47	45	45	45	44
44	43	42	40	39	39	44	44	43	43	43	42
43	41	41	44	49	50	48	46	48	47	47	48
40	39	36	40	43	47	45	44	45	45	43	44
45	45	48	47	48	48	50	51	55	54	54	57
43	43	44	45	46	45	48	49	50	52	52	54
58	61	61	60	60	60	60	60	66	67	71	69
55	58	57	54	56	55	55	56	58	64	66	64
75	71	70	69	70	69	69	68	73	73	71	72
68	68	67	65	65	67	66	66	67	70	66	68
72	72	69	68	68	70	71	69	68	67	70	73
67	68	67	66	66	67	68	67	66	64	65	66
70	70	69	69	74	73	72	72	71	74	78	82
68	67	66	67	69	68	68	69	68	71	73	74

* used to next full figure for fractional price of one-half or more; fractional
under one-half disregarded.

period January 1 to January 16; on January 16, 1946 - stock split 3 for 1;
subsequent quotations reflect such split.

28.

The aforesaid loan was repaid as set out below by payments of interest and principal made by Chase Bank as Trustee from funds in its hands received as contributions of participants, as contributions by J. C. Penney Company under the provisions of the Plan, and received as dividends upon the shares of stock:

Date Paid	Paid as Interest	Paid as Principal	Balance Principal After Payment
1940			
Aug. 1	Principal of Note		\$5,700,000.00
Aug. 1		\$1,500,000.00	4,200,000.00
Sept. 26		150,000.00	4,050,000.00
Sept. 30		50,000.00	4,000,000.00
Oct. 17	\$12,975.00		
Dec. 27		550,000.00	3,450,000.00
1941			
Jan. 15	14,587.50		
Feb. 21		550,000.00	2,900,000.00
Mar. 5		1,850,000.00	1,050,000.00
Mar. 7		475,000.00	575,000.00
Mar. 31		75,000.00	500,000.00
Apr. 15	7,817.71		
June 30		150,000.00	350,000.00
Jul. 15	1,781.25		
Sept. 30		150,000.00	200,000.00
Oct. 15	1,218.75		
Dec. 27		200,000.00	—
Dec. 29	600.00		

29.

On July 25, 1940, R. W. Trown, then Comptroller of the Penney Company, mailed to each manager, including plaintiffs, and to eligible central and branch office executives, a letter in the form of Ex.

126, and enclosed therewith a printed booklet in the form of Ex. 125 and also enclosed a Participant's Acceptance Form.

30.

Plaintiff Harvey L. Wells and plaintiff Harry J. Albertsen, as store managers, each received one of the letters of R. W. Trown (Ex. 126), together with the printed booklet (Ex. 125) and the Participant's Acceptance Form. Each of the plaintiffs signed and returned to Penney Company the receipt appended to the foot of Ex. 126, and his executed Acceptance Form (Exs. 206, 207).

31.

On December 16, 1940, R. W. Trown certified the list of participants under the Plan (Ex. 124). As of December 16, 1940 there were 1,716 eligible participants, all of whom had executed their Participant's Acceptance Forms (Ex. 124). All eligible members of the management staff of Penney Company who thereafter became participants in the Plan also signed such "Participant's Acceptance Form."

32.

Plaintiff Harvey L. Wells' participation in the Plan continued from its inception until his resignation on August 31, 1948. Plaintiff Harry J. Albertsen's participation in the Plan continued from its inception until his discharge on December 31, 1950.

33.

Pursuant to the provisions of the Retirement Plan the following action was taken for the years 1940 through 1953 inclusive:

A. From their compensation earned in 1939 and paid in 1940, 1130 participants made voluntary contributions (being up to $33\frac{1}{3}$ per cent of the 1939 compensation of each) in the total amount of \$1,666,-827.89, of which amount \$1,575,000 was paid to the Trustee on August 1, 1940, and the remainder of \$91,827.89 was paid to the Trustee on September 26, 1940.

B. Each participant out of compensation earned in the years 1940 and 1941 contributed to the Fund under the Plan $33\frac{1}{3}\%$ of such annual compensation (Article 4 of Ex. 125) which were paid over to the Trustee in the amounts and on the dates set forth in the table set forth on page 26-b. Pursuant to the action taken by the Board of Directors in amending this Article because of increased Federal Personal Income Taxes, the percentage of each participant's contribution for subsequent years was reduced to 20% of his annual compensation. (pp. 1449-50 of Ex. 18; pp. 1497-98 of Ex. 20; pp. 1549-50 of Ex. 22).

C. After the close of the calendar year 1940 and of each calendar year thereafter, the Penney Company contributed annually to the Fund under the Plan:

1. An amount equal to 2% of the prior year's aggregate regular salary paid to all employees receiving compensation as defined in the Plan for all or any part of the respective year, pursuant to Article 6(a) of the Plan.

2. For each of the years 1940 through 1949, an amount equal to 6% of its consolidated net profits

for the calendar year in excess of 15% of its common stock book value as at the beginning of such calendar year, pursuant to Article 6(b) of the Plan. However, pursuant to the action of the Board of Directors taken because of the increased Federal taxes applicable to corporate profits for the years 1940 through 1945, in computing the contribution for these years called for by Article 6(b) there was charged against the consolidated net profits of the Company a lower amount for Federal taxes than the amount actually payable. (Ex. 9; pp. 1394-95 of Ex. 14; Ex. 16; pp. 1451-53 of Ex. 18; pp. 1501-03 of Ex. 20; pp. 1549-51 of Ex. 22). For the years 1946 through 1949, pursuant to an amendment adopted by the Board of Directors restoring subdivision (b) of Article 6 to its original form effective January 1, 1946 (pp. 1654-55 of Ex. 31) the Company's 6% contribution was computed and made as originally provided in Article 6(b).

3. For each of the years 1950 through 1953, pursuant to an amendment to the Plan approved by the stockholders at a special Stockholders' Meeting held on December 27, 1950 (Ex. 325), an amount equal to 2% of the profits of the Company and its wholly owned subsidiaries for such calendar year available to its common stock as shown by the books of the Company before deduction of provision for Federal taxes based on the profits of the Company and its subsidiaries, and the amounts required to be contributed by the Company for such year under the terms of its Thrift and Profit-Sharing Retirement Fund Plan and under the terms of this Plan.

34.

A. The annual contributions of each participant were credited to his separate account upon records maintained by the Administrative Committee of the Plan.

B. The Company's annual contributions measured by profits under Article 6(b) of the Plan were placed in an excess profits account for credit to accounts of participants upon their retirement or other separation from the Company.

C. The 200,000 shares of Penney Company common stock were separated in the Fund's accounts into two blocks, one of 50,000 shares and one of 150,000 shares.

D. The Company's contributions measured by salary under Article 6(a) of the Plan were credited to the \$1,500,000 cost of the 50,000 share block until that cost was entirely covered in September, 1941 by this contribution for 1940 amounting to \$102,-206.97 and dividend credits of \$1,397,793.03. Thereafter such contributions were credited to the Reserve for Retirement account for the purpose of covering the \$4,500,000 cost of the 150,000 share block.

E. After payment therefrom of interest on the money borrowed to purchase the stock and incidental Plan expenses not borne by the Company, dividends received by the Trustee on the 200,000 shares of stock (including the dividend credit of \$300,000 representing the equivalent of dividends of \$1.50 per share paid by the Company on its outstanding common stock in 1940 prior to the date

the Trustee purchased the stock, being the adjustment provided for in Article 5 of the Plan) were applied to cover the cost of the 50,000 share block of stock, which was covered in September, 1941. Dividends received by the Trustee thereafter were credited to the Dividend Account. On August 8, 1945 the Trustee paid the Company \$300,000, the amount of the adjustment referred to above, as an addition to the purchase price of the stock which payment was charged against the Dividend account. Participants' accounts were credited with their proportionate share of the net balance in the Dividend Account upon their retirement or other separation from the Plan.

35.

On July 1 of each year commencing with the year 1945 each participant who had attained or in that year attained the age of 60, as defined in the Plan, received a paid-up non-assignable annuity purchased with the credits shown on Exhibits 67 to 73, 313 and 315, together with the shares of stock shown upon such exhibits.

36.

A. The tabulation relating to retirements in 1945 (Ex. 67), was presented at the meeting of the Administrative Committee held July 20, 1945, and is the statement referred to as presented by R. W. Trown in the minutes of said meeting (Ex. 90).

B. The tabulation relating to retirements in 1946 (Ex. 68), was presented at the meeting of the Administrative Committee held July 23, 1946, and is the statement referred to as presented by R. C.

Weiderman in the minutes of said meeting (Ex. 96).

C. The tabulation relating to retirements in 1947 (Ex. 69), was presented at the meeting of the Administrative Committee held July 30, 1947, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 99).

D. The tabulation relating to retirements in 1948 (Ex. 70), was presented at the meeting of the Administrative Committee held July 30, 1948, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 104).

E. The tabulation relating to retirements in 1949 (Ex. 71), was presented at the meeting of the Administrative Committee held July 15, 1949, and is the statement referred to as presented by Mr. Campbell in the minutes of said meeting (Ex. 111).

F. The tabulation relating to retirements in 1950 (Ex. 72), was presented at the meeting of the Administrative Committee held July 28, 1950, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 115).

G. The tabulation relating to retirements in 1951 (Ex. 73), was presented at the meeting of the Administrative Committee held July 13, 1951, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 122).

H. The tabulation relating to retirements in 1952 (Ex. 313), was presented at the meeting of the Administrative Committee held July 11, 1952, and

is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 314).

I. The tabulation relating to retirements in 1953 (Ex. 315), was presented at the meeting of the Administrative Committee held July 14, 1953, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 316).

37.

Each participant whose participation ceased prior to July 1, 1945, or thereafter but prior to such participant's reaching age 60, as defined in the Plan, or in case of death, his beneficiary, received the total amount shown upon Exhibit 292.

38.

The total contributions of all participants for each year with the date the same were paid into the Fund, the withdrawals of contributions by participants prior to July 1 of each year, the total contributions of all participants in the Fund on July 1 of each year, the withdrawals of contributions by participants retired on July 1 of each year, the withdrawals of contributions by participants from July 1 to December 31 of each year, and the total contributions of all participants in the Fund on December 31 of each year, were as shown below:

Date Paid	Compensation for Year	Service Contributions	Regular Contributions	January 1 to June 30	in Fund July 1	Retirements July 1	July 1 to December 31	in Fund December 31
1940	1939	\$ -	\$1,666,827.89	\$ -	\$ 1,666,827.89*	\$ -	\$ 3,436.73	\$ 1,663,391.16
1941	1940	-	2,374,941.39	58,996.15	3,979,336.40	-	25,446.39	3,953,890.01
1942	1941	3,832.08	4,207,163.20	163,541.53	8,001,343.76	-	20,831.76	7,980,512.00
1943	1942	21,835.67	2,990,684.65	132,404.36	10,860,627.96	-	145,089.93	10,715,538.03
1944	1943	105,015.69	2,500,731.91	190,424.78	13,130,860.85	-	151,957.66	12,978,903.19
1945	1944	136,527.41	2,769,758.15	321,760.12	15,563,428.63	743,059.16	382,889.43	14,437,480.04
1946	1945	91,763.35	2,385,736.06	527,081.59	16,387,897.86	180,351.19	194,083.95	16,013,462.72
1947	1946	9,352.10	2,972,507.23	497,014.11	18,498,307.94	359,033.40	278,301.84	17,860,972.70
1948	1947	-	2,896,387.51	717,377.84	20,039,982.37	344,041.50	150,669.78	19,545,271.09
1949	1948	-	4,062,407.13	520,453.35	23,087,224.87	480,422.45	130,954.43	22,475,847.99
1950	1949	-	3,625,287.15	542,078.60	25,559,056.54	714,276.53	88,035.35	24,756,744.66
1951	1950	305.70	4,462,457.28	388,632.61	28,830,875.03	972,501.75	216,325.37	27,642,047.91
1952	1951	883.13	4,034,269.45	701,081.89	30,976,118.60	1,430,153.91	384,967.70	29,160,996.99
1953	1952	1,547.35	4,423,539.71	556,249.37	33,029,834.68	1,128,302.62	366,082.02	31,535,450.04

*Trust Agreement entered into July 8, 1940; this amount paid to Fund August 1, 1940 and September 26, 1940.

8-1-40	\$ -	\$1,575,000.00	1-29-46	\$ -	\$ 100,000.00
9-26-40	-	91,827.89	2-28-46	91,763.35	2,016,636.91
	-	<u>1,666,827.89</u>	6-3-46	-	<u>269,099.15</u>
	-			<u>91,763.35</u>	<u>2,385,736.06</u>
2-20-41	-	533,143.05			
3-5-41	-	1,824,676.02	2-24-47	-	670,219.51
4-2-41	-	988.84	2-26-47	9,352.10	555,614.80
5-15-41	-	<u>16,133.48</u>	3-18-47	-	1,500,000.00
	-	<u>2,374,941.39</u>	5-21-47	-	<u>246,672.92</u>
				<u>9,352.10</u>	<u>2,972,507.23</u>
1-9-42	3,832.08	2,232,038.17			
3-3-42	-	901,266.34	2-27-48	-	695,502.86
3-18-42	-	801,012.45	2-28-48	-	175,862.71
4-17-42	-	267,971.87	3-16-48	-	2,000,000.00
5-20-42	-	<u>4,874.37</u>	6-28-48	-	<u>25,021.94</u>
	<u>3,832.08</u>	<u>4,207,163.20</u>		-	<u>2,896,387.51</u>
2-19-43	-	1,394,021.59	1-26-49	-	3,000,000.00
2-26-43	-	605,728.41	2-25-49	-	907,714.68
3-1-43	21,835.67	647,482.39	5-17-49	-	154,692.45
4-12-43	-	340,142.62		-	<u>4,062,407.13</u>
5-5-43	-	2,321.31			
8-9-43	-	<u>988.33</u>			
	<u>21,835.67</u>	<u>2,990,684.65</u>	1-19-50	-	2,000,000.00
			2-28-50	-	1,475,156.80
2-29-44	105,015.69	1,682,610.96	4-12-50	-	<u>150,130.35</u>
4-27-44	-	<u>818,120.95</u>		-	<u>3,625,287.15</u>
	<u>105,015.69</u>	<u>2,500,731.91</u>			
1-23-45	-	100,000.00	1-25-51	-	3,000,000.00
2-28-45	136,527.41	2,484,946.07	2-28-51	-	1,310,199.14
5-23-45	-	<u>184,812.08</u>	4-5-51	<u>305.70</u>	<u>152,258.14</u>
	<u>136,527.41</u>	<u>2,769,758.15</u>		<u>305.70</u>	<u>4,462,457.28</u>

*Additional contributions arising from adjustments of several participants' compensation for previous year.

Date Paid	Military Service Contributions		Regular Contributions	
	Military Service Contributions	Regular Contributions	Date Paid	Regular Contributions
1-18-52	\$ -	\$2,500,000.00		
2-25-52	-	1,434,986.64		
4-16-52	883.13	99,282.81		
	<u>883.13</u>	<u>4,034,269.45</u>		
1-19-53	-	2,500,000.00		
2-25-53	-	1,777,158.29		
3-25-53	1,547.35	146,381.42		
	<u>1,547.35</u>	<u>4,423,539.71</u>		

39.

The dividends received upon the shares of stock held in the Fund, after allocation for the cost of the 50,000 share block and expenses, together with the dates when such dividends were received, the withdrawals from the Dividend Account by retirements of participants and otherwise for the years 1940 to 1952, both inclusive, and to Oct. 1, 1953, were as shown below:

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<u>1940</u>					
Sept. 30	\$.75	\$.25	\$ 150,000.00		
Dec. 26	2.75	.91 2/3	<u>550,000.00</u>		
	Total for year		\$ 700,000.00	\$674,593.75	\$25,406.25
<u>1941</u>					
Mar. 31	\$.75	\$.25	\$ 150,000.00		
June 30	.75	.25	150,000.00		
Sept. 30	.75	.25	150,000.00		
Dec. 27	2.75	.91 2/3	<u>550,000.00</u>		
	Total for year		\$1,000,000.00	423,199.28	14,833.35
				\$ 32.27	\$ 561,935.10
<u>1942</u>					
Mar. 31	\$.75	\$.25	\$ 150,000.00		
June 30	.75	.25	150,000.00		
Sept. 30	.75	.25	150,000.00		
Dec. 24	2.75	.91 2/3	<u>550,000.00</u>		
	Total for year		\$1,000,000.00	15,246.72	1,546,688.38
<u>1943</u>					
Mar. 31	\$.75	\$.25	\$ 150,000.00		
June 30	.75	.25	150,000.00		
Sept. 30	.75	.25	150,000.00		
Dec. 24	2.75	.91 2/3	<u>550,000.00</u>		
	Total for year		\$1,000,000.00	44,606.44	2,502,081.94

1994		Present Share	Stock	Amount	Shares	Expenses	Retirement	Otherwise	in Full December 31
Mar. 31	\$.75	\$.25	\$ 150,000.00						
June 30	.75	.25	150,000.00						
Sept. 30	.75	.25	150,000.00						
Dec. 23	2.75	.91 2/3	550,000.00						
Total for year				\$2,000,000.00				\$ 70,253.44	\$3,431,823.50
1995									
Mar. 31	\$.75	\$.25	\$ 150,000.00						
June 30	.75	.25	150,000.00						
Sept. 29	.75	.25	144,627.75						
Dec. 22	2.75	.91 2/3	530,301.75						
Total for year				\$ 974,929.50	300,000.00*		\$160,480.63	154,892.61	3,791,384.76
1996									
Mar. 30	\$.35	\$	\$ 202,478.85						
June 29	.35		202,478.85						
Sept. 30	.50		206,778.50						
Dec. 28	1.50		860,335.50						
Total for year				\$1,552,071.70			44,827.51	173,134.49	5,125,494.46
1997									
Mar. 31	\$.50	\$	\$ 286,778.50						
June 30	.50		286,778.50						
Sept. 30	.50		282,411.50						
Total for year				\$ 855,968.50			107,906.44	224,487.65	5,649,058.97

*Represents payment by Trustee to Company as additional purchase price of 200,000 shares of stock and applied to cost of 50,000 shares.

		Cost 50,000 Shares	Expenses	Retirement	Otherwise	In Fund December 31
Present Stock		Amount				
<u>1948</u>						
Jan. 2	(Ex 136a)	\$ 564,823.00				
Apr. 1	(Ex 136b)	282,411.50				
July 1	(Ex 136c)	282,411.50				
Oct. 1	(Ex 136d)	278,546.00				
Total for year		\$1,408,194.00		\$112,581.68	\$271,158.80	\$6,673,522.39
<u>1949</u>						
Jan. 3	(Ex 137a)	\$ 557,096.00				
Apr. 1	(Ex 137b)	278,548.00				
July 1	(Ex 137c)	278,509.00				
Oct. 1	(Ex 137d)	273,828.50				
Total for year		\$1,387,981.50		159,265.22	205,619.24	7,696,619.43
<u>1950</u>						
Jan. 3	(Ex 138a)	\$ 821,485.50				
Apr. 1	(Ex 138b)	273,828.50				
July 1	(Ex 138c)	273,828.50				
Oct. 2	(Ex 138d)	267,539.00				
Total for year		\$1,636,681.50		248,287.73	212,336.32	8,872,676.88
<u>1951</u>						
Jan. 3	(Ex 139a)	\$1,070,156.00				
April 2	(Ex 139b)	267,539.00				
July 2	(Ex 139c)	267,539.00				
Oct. 1		259,950.50				
Total for year		\$1,865,184.50		348,895.13	212,926.07	10,176,040.18

1952

Jan. 2	\$ 909,826.75		
Apr. 1	259,950.50		
July 1	259,950.50		
Oct. 1	<u>249,562.00</u>		
Total for year	\$1,679,289.75	\$524,320.55	\$391,437.28
			\$10,939,572.10

1953

Jan. 2	\$ 998,248.00		
Apr. 1	249,562.00		
July 1	249,562.00		
Oct. 1	<u>241,877.00</u>		
Total for year	\$1,739,249.00	417,949.75	340,096.80
			11,920,774.55

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40.

The contributions of Penney Company from excess profits under Article 6(b) of the Plan, with the dates of payment to the Fund, the withdrawals from the Excess Profits Account by participants from January 1 to June 30 of each year, by retirements on July 1 of each year, and by withdrawals between July 1 and December 31 of each year, and the balance in the Excess Profits Account on July 1 and December 31 of each year for the years 1941 to 1953, both inclusive, were as follows:

Statement of

1952-1953 Pre-trial Order

Date Paid*	For Year	Total Withdrawals	Contributions	from January 1 to June 30	Balance on July 1	Retirement July 1	from July 1 to December 31	Balance December 31
1941	1940	\$ 7,338.64	\$ 371,931.56	\$ 5,339.92	\$ 366,591.64	\$ -	\$ 1,998.72	\$ 364,592.92
1942	1941	28,254.38	955,639.69	25,174.61	1,295,058.00	-	3,079.77	1,291,978.23
1943	1942	59,474.61	1,290,275.31	28,374.22	2,553,879.32	-	31,100.39	2,522,778.93
1944	1943	84,705.54	986,996.36	47,230.71	3,462,544.58	-	37,474.83	3,425,069.75
1945	1944	387,532.06	1,049,891.44	86,315.77	4,388,645.42	197,395.18	103,821.11	4,087,429.13
1946	1945	265,675.28	1,056,981.14	156,192.50	4,988,217.77	51,602.97	57,879.81	4,878,734.99
1947	1946	354,119.14	1,287,254.49	159,331.71	6,006,657.77	107,692.48	87,094.95	5,811,870.34
1948	1947	393,935.84	1,156,563.53	235,165.95	6,733,267.92	109,248.17	49,521.72	6,574,498.03
1949	1948	392,541.16	1,809,556.33	184,441.21	8,199,613.15	161,413.36	46,686.59	7,991,513.20
1950	1949	453,539.75	1,131,431.69	188,011.01	8,934,933.88	234,171.64	31,357.10	8,669,405.14
1951	1950	522,142.62	1,194,348.86	133,747.44	9,730,006.56	314,594.96	73,800.22	9,341,611.38
1952	1951	862,373.07	1,756,878.19	244,479.91	10,854,009.66	485,087.23	132,805.93	10,236,116.50
1953	1952	720,078.06	1,957,011.45	197,366.71	11,995,761.24	392,373.58	130,337.77	11,473,049.89

*The contribution for the year 1940 was paid on March 6, 1941; payments for other years were made on or before the 60th day of the year shown in this column to conform with the provision of the Revenue Act of 1942.

The cash in the hands of the Trustee on the dates shown

the following was the amount shown opposite the date in the first

upon and after receipt of funds shown:

[illegible]

actually made up of May 7 withdrawals totalling \$10,592.67, less redeposit on that date of check drawn March 12 to L. E. Ramon for \$488.97, plus May 8 total withdrawals of \$7,706.24.



The figures reflecting the operation of the Plan for the

period January 1, 1940, through December 31, 1953, as recorded on the books of account of the Fund maintained by the Administrative Committee of the Plan are set forth on Schedule 1 (pages 1-6)

SCHEDULE 1

Figures reflecting the operation of the Retirement Plan for the period January 1, 1940 through December 31, 1953

Company's Contributions															Rate Grade (Dividends)	From Insurance Co.	Total	Year
J. C. Penney Company Common Stock		Dividends on J. C. Penney Company Common Stock		Under Article 6A						Under Article 6B	Participants' Contributions	Funds (Net)						
				Applied to Cost of Stock	Credited to Reserve for Retirement	Applied to Cost of Stock	Credited to Reserve for Retirement	Applied to Cost of Stock	Credited to Reserve for Retirement									
Block No. 1 (Shares)	Block No. 2 (Shares)	Amount	Interest of Stock	Block No. 1	Dividend A/C	Amount	Block No. 1	Block No. 2	Block No. 3	Block No. 4	Block No. 5	Block No. 6	Block No. 7	Block No. 8	Block No. 9	Block No. 10		
Table A - RECEIPTS OF FUND UNDER PLAN																		
50,000	150,000	1,000,000.00(1)	25,406.25	974,593.75	-	102,206.97	102,206.97	-	-	-	-	-	-	-	-	5,515,907.81	1940	
-	-	1,000,000.00	14,833.35	423,199.28	561,967.37	108,490.06	-	108,490.06	955,639.69	4,041,769.28(2)	-	-	-	-	-	6,275,125.03	1941	
-	-	1,000,000.00	-	-	115,703.10	-	-	115,703.10	2,890,275.33	3,012,590.28	40,260.99	-	-	-	-	6,486,779.72	1942	
-	-	1,000,000.00	-	-	2,005,000.00	-	-	2,005,000.00	986,296.30	1,017,650.60	1,017,650.60	-	-	-	-	8,504,430.32	1943	
-	-	1,000,000.00	-	-	1,000,000.00	128,635.08	-	128,635.08	4,091,891.44	2,906,285.56	150,564.02	-	-	-	-	9,535,375.10	1944	
-	-	674,929.50(3)	-	-	674,929.50(3)	134,618.60	-	134,618.60	1,056,981.14	2,477,499.41	176,734.74	-	-	-	-	10,250,753.39	1945	
85,674(4)	300,000(4)	1,552,071.70	-	-	1,552,071.70	147,778.61	-	147,778.61	2,827,434.49	2,981,859.33	201,450.75	-	-	-	-	11,770,414.18	1946	
-	-	1,420,791.50	-	-	1,420,791.50	1,156,561.51	-	1,156,561.51	2,896,425.40	239,425.40	5,880,741.70	-	-	-	-	18,441,741.70	1947	
-	-	1,400,467.00	-	-	1,400,467.00	1,028,999.33	-	1,028,999.33	1,809,556.33	4,062,407.13	40,909.16	-	-	-	-	17,496,068.61	1948	
-	-	1,652,371.00	-	-	1,652,371.00	193,411.51	-	193,411.51	1,131,431.69	3,628,287.15	7,744.32	-	-	-	-	18,680,564.56	1949	
-	-	1,885,352.00	-	-	1,885,352.00	195,452.00	-	195,452.00	1,134,348.86	4,465,762.96	6,669.24	-	-	-	-	19,382,587.41	1950	
-	-	1,774,855.25	-	-	1,774,855.25	208,635.08	-	208,635.08	1,758,678.19	5,013,137.58	1,013,005.39	-	-	-	-	20,408,796.03	1951	
-	-	1,767,711.00	-	-	1,767,711.00	215,830.26	-	215,830.26	1,957,031.45	4,427,067.10	1,115,530.11	-	-	-	-	22,021,913.43	1952	
-	-	1,708,509.00	-	-	1,708,509.00	226,262.10	-	226,262.10	1,952,289.80	4,425,352.33	23,115.38	-	-	-	-	23,041,171.83	1953	

Table B - WITHDRAWALS FROM FUND BY PARTICIPANTS ON SEPARATION, INCLUDING RETIREMENTS

[illegible]

nds received in 1940 on the 200,000 shares of stock amounted to \$700,000. To this amount has been added \$300,000, representing the equivalent of dividends of \$1.50 per share paid by J. C. Penney any on its common stock in 1940 prior to the acquisition of the 200,000 shares of stock by the Trustee and, in accordance with the provisions of the Plan, regarded as dividends.

charge to dividend account of \$300,000 payment by Trustee to J. C. Penney Company as additional purchase price of the 200,000 shares of stock, in settlement of a stockholder's action judicially
promised.

ed in January 1946 as a result of the Company's three-for-one split of its stock.
es \$371,521.76 contributed by Company equivalent to amount which would have been contributed by participants had they continued in active employ of the Company for the periods during which they
ed in the Armed Forces.

and rate credits (dividends) applicable to participants whose Plan participation ceased in a prior year and who allowed their deferred annuities to continue in force.

Figure is stated on the basis of the Company's stock before its three-for-one split; figures for subsequent years are stated on basis of Company's stock after split.

SCHEDULE 1
(Page 1)

SCHEDULE 1

Table B on preceding page segregated as to withdrawals by participants whose participation ceased before reaching retirement status and those who reached retirement status

Shares of J.C. Penney Company Common Stock	J.C. Penney Company Dividends credited to Dividend A/C	Company's contributions under Article 6B	Participants' Contributions	Fund Earnings	Rate Credits (Dividends) from Insurance Co.	Total	Year
-	-	-	3,436.73	-	-	3,436.73	1940
-	32.27	7,338.64	84,442.54	-	-	91,813.45	1941
-	15,246.72	28,254.38	184,373.29	-	-	227,874.39	1942
-	44,606.44	59,474.61	277,494.29	-	-	381,575.34	1943
-	70,253.44	84,705.54	342,382.44	-	-	497,341.42	1944
-	154,892.61	190,136.88	704,649.55	-	-	1,049,679.04	1945
-	173,134.49	214,072.31	721,165.54	-	-	1,108,372.34	1946
-	224,487.65	246,426.66	775,315.95	-	-	1,246,230.26	1947
-	271,158.80	284,687.67	868,047.62	100,469.50	-	1,524,363.59	1948
-	205,619.24	230,528.88	645,802.36	23,762.47	6,246.71	1,111,955.66	1949
-	212,336.32	219,368.11	630,113.95	19,252.32	19,140.47	1,100,211.17	1950
-	212,926.07	207,547.66	604,957.98	14,863.86	39,458.33	1,079,753.90	1951
-	391,437.28	377,285.84	1,086,049.59	27,822.04	135,256.03	2,017,850.78	1952
-	340,096.80	327,704.48	922,331.39	20,719.73	118,426.09	1,729,278.49	1953
-	2,316,228.13	2,477,527.66	7,850,563.22	206,889.92	318,527.63	13,169,736.56	

Table D - Withdrawals by participants who reached retirement status

-	-	-	-	-	-	-	1940
-	-	-	-	-	-	-	1941
-	-	-	-	-	-	-	1942
-	-	-	-	-	-	-	1943
-	-	-	-	-	-	-	1944
7,163	160,480.63	197,395.18	743,059.16	-	-	1,100,934.97	1945
4,954	44,827.51	51,602.97	180,351.19	-	-	276,781.67	1946
8,734	107,906.44	107,692.48	359,033.40	-	-	574,632.32	1947
7,727	112,581.68	109,248.17	344,041.50	46,032.49	-	611,903.84	1948
9,439	159,265.22	162,016.28	486,027.87	18,821.10	5,618.80	831,749.27	1949
12,579	248,287.73	234,171.64	714,276.53	25,225.46	22,721.29	1,244,682.65	1950
15,177	348,895.13	314,594.96	972,501.75	30,432.04	59,481.87	1,725,905.75	1951
20,777	524,320.55	485,087.23	1,430,153.91	40,780.47	81,453.90	2,561,796.06	1952
15,370	417,949.75	392,373.58	1,128,302.62	29,309.37	85,154.91	2,053,090.23	1953
101,920	2,128,514.64	2,054,182.49	6,357,747.93	190,600.93	254,430.77	10,981,476.76	
101,920	4,440,742.77	4,531,710.15	14,208,311.15	397,490.85	572,958.40	24,151,213.32	

Amount shown in this column for 1948, 1949, 1950 and 1951 differs from that shown on the statements attached to the minutes of the Administrative Committee (Exs. 70, 71, 72 and 73) as having been used for the purchase of annuities for the participants who retired each of these years because it includes:

8 - \$46,032.49 - the share of the Reserve for Depreciation of Assets distributed in cash to participants who had reached retirement status prior to the distribution;

9 - \$5,618.80 - dividends paid by insurance companies as of but subsequent to June 30, 1949 allocable to participants who retired on July 1 that year and applied by the insurance companies to increase the annuities received by them on their retirement;

0 - \$15,270.16 and 1951 - \$31,798.51 - dividends paid by insurance companies in 1950 and 1951 as of but subsequent to June 30 of the respective years allocable to participants who retired on July 1 in those years and paid to them by the insurance companies in cash, pursuant to a 1950 amendment to the Group Annuity Contracts.



SCHEDULE 1

Participants' contributions (including military service contributions)
and participants' withdrawals segregated to periods shown

Table E

Contributions in Fund January 1	Withdrawals From January 1 to June 30	Contributions in Fund July 1	Withdrawals By Retirement July 1	Withdrawals From July 1 to Dec. 31	Contributions from Compensation				Contributions in Fund December 31
					Year Earned	Year Paid	Total Contributions Regular	Military Service (1)	
-	-	-	-	-	1939	1940	1,666,827.89*	-	-
-	-	1,666,827.89	-	3,436.73	1940	1941	2,374,941.39 }	-	4,038,332.55
4,038,332.55	58,996.15	3,979,336.40	-	25,446.39	1941	1942	4,207,163.20	3,832.08	8,164,885.29
8,164,885.29	163,541.53	8,001,343.76	-	20,831.76	1942	1943	2,990,684.65	21,835.67	10,993,032.32
10,993,032.32	132,404.36	10,860,627.96	-	145,089.93	1943	1944	2,500,731.91	105,015.69	13,321,285.63
13,321,285.63	190,424.78	13,130,860.85	-	151,957.66	1944	1945	2,769,758.15	136,527.41	15,885,188.75
15,885,188.75	321,760.12	15,563,428.63	743,059.16	382,889.43	1945	1946	2,385,736.06	91,763.35	16,914,979.45
16,914,979.45	527,081.59	16,387,897.86	180,351.19	194,083.95	1946	1947	2,972,507.23	9,352.10	18,995,322.05
18,995,322.05	497,014.11	18,498,307.94	359,033.40	278,301.84	1947	1948	2,896,387.51	-	20,757,360.21
20,757,360.21	717,377.84	20,039,982.37	344,041.50	150,669.78	1948	1949	4,062,407.13	-	23,607,678.22
23,607,678.22	520,453.35**	23,087,224.87	480,422.45	130,954.43	1949	1950	3,625,287.15	-	26,101,135.14
26,101,135.14	542,078.60	25,559,056.54	714,276.53	88,035.35	1950	1951	4,462,457.28	305.70	29,219,507.64
29,219,507.64	388,632.61	28,830,875.03	972,501.75	216,325.37	1951	1952	4,034,269.45	883.13	31,677,200.49
31,677,200.49	701,081.89	30,976,118.60	1,430,153.91	384,967.70	1952	1953	4,423,539.71	1,547.35	33,586,084.05
33,586,084.05	556,249.37	33,029,834.68	1,128,302.62	366,082.02	1953	1954	4,425,893.05	459.28	35,961,802.37

Figure represents total voluntary contributions of participants from 1939 compensation.
\$5,605.42 for W. E. Keith, actually born in 1885 but on his Participant's Acceptance Form showed 1894 as year of birth; terminated
in March, 1949 and treated as though he had reached retirement status on July 1, 1945. Of the \$5,605.42, \$2,732.25 applied to
Keith's annuity and the balance, being his personal deposits for years 1945 through 1948, was refunded to Keith.
Participants in military service: equivalent to amounts they would have contributed had they remained in the active employ of the
for the periods of their military service.

SCHEDULE 1

Company contributions under Article 6 (b) and
participants' withdrawals segregated to periods shown

Table F

<u>Balance in Account January</u>	<u>Withdrawals from January 1 to June 30</u>	<u>Balance in Account July 1</u>	<u>Withdrawals by Retire- ments July 1</u>	<u>Withdrawals from July 1 to Dec. 31</u>	<u>Company Contributions</u>	<u>Balance in Account December 31</u>
-	-	-	-	-	371,931.56	371,931.56
371,931.56	5,339.92	366,591.64	-	1,998.72	955,639.69	1,320,232.61
1,320,232.61	25,174.61	1,295,058.00	-	3,079.77	1,290,275.31	2,582,253.54
2,582,253.54	28,374.22	2,553,879.32	-	31,100.39	986,996.36	3,509,775.29
3,509,775.29	47,230.71	3,462,544.58	-	37,474.83	1,049,891.44	4,474,961.19
4,474,961.19	86,315.77	4,388,645.42	197,395.18	103,821.11	1,056,981.14	5,144,410.27
5,144,410.27	156,192.50	4,988,217.77	51,602.97	57,879.81	1,287,254.49	6,165,989.48
6,165,989.48	159,331.71	6,006,657.77	107,692.48	87,094.95	1,156,563.53	6,968,433.87
6,968,433.87	235,165.95	6,733,267.92	109,248.17	49,521.72	1,809,556.33	8,384,054.36
8,384,054.36	184,441.21*	8,199,613.15	161,413.36	46,696.59	1,131,431.69	9,122,944.89
9,122,944.89	188,011.01	8,934,933.88	234,171.64	31,357.10	1,194,348.86	9,863,754.00
9,863,754.00	133,747.44	9,730,006.56	314,594.96	73,800.22	1,756,878.19	11,098,489.57
11,098,489.57	244,479.91	10,854,009.66	485,087.23	132,805.93	1,957,011.45	12,193,127.95
12,193,127.95	197,366.71	11,995,761.24	392,373.58	130,337.77	1,982,209.80	13,455,259.69

udes \$1,831.05 from the account of W. E. Keith (see footnote on Page 3 of this Schedule); \$602.92 applied to purchase Keith's annuity
the balance, being credits to Keith's account for years 1945 through 1948, was held in suspense and credited to other participants'
unts as Company contribution as at end of 1949.



SCHEDULE 1

Dividends on J. C. Penney Company stock held by Trustee
showing receipts, applications and withdrawals

Table G

Of Record	Per Share	Present Stock	Amount	Dividend Applied		Dividend Account	Withdrawals from Dividend Account		Balance in Account	
				Cost 50,000 Shares	Expenses		Retirements	Otherwise	December 31	Year
				(Dividends received in 1940 on the 200,000 shares of stock amounted to \$700,000. To this amount has been added \$300,000, representing the equivalent of dividends of \$1.50 per share paid by J. C. Penney Company on its common stock in 1940 prior to the acquisition of the 200,000 shares of stock by the Trustee and, in accordance with the provisions of the Plan, regarded as dividends.)						
0	\$.75	\$.25	\$ 150,000.00							
0	.75	.25	150,000.00							
0	.75	.25	150,000.00							
0	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>	974,593.75	25,406.25	None			None	1940
1	.75	.25	150,000.00							
1	.75	.25	150,000.00							
1	.75	.25	150,000.00							
1	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>	423,199.28	14,833.35	561,967.37	-	32.27	561,935.10	1941
2	.75	.25	150,000.00							
2	.75	.25	150,000.00							
2	.75	.25	150,000.00							
2	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>			1,000,000.00	-	15,246.72	1,546,688.38	1942
3	.75	.25	150,000.00							
3	.75	.25	150,000.00							
3	.75	.25	150,000.00							
3	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>			1,000,000.00	-	44,606.44	2,502,081.94	1943
4	.75	.25	150,000.00							
4	.75	.25	150,000.00							
4	.75	.25	150,000.00							
4	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>			1,000,000.00	-	70,253.44	3,431,828.50	1944
5	.75	.25	150,000.00							
5	.75	.25	150,000.00							
Payment in August 1945 by Trustee to Company as additional purchase price of \$200,000 shares of stock.			<u>300,000.00</u>							
5	.75	.25	144,627.75							
5	2.75	.91 2/3	530,301.75							
			<u>674,929.50</u>			674,929.50	160,480.63	154,892.61	3,791,384.76	1945
6 (Stock Split)	.35	.35	202,478.85							
6 (3 for 1 on)	.35	.35	202,478.85							
6 (1-16-1946)	.50	.50	286,778.50							
6	1.50	1.50	860,335.50							
			<u>1,552,071.70</u>			1,552,071.70	44,827.51	173,134.49	5,125,494.46	1946
7	.50	.50	286,778.50							
7	.50	.50	286,778.50							
7	.50	.50	282,411.50							
12/17/47	1.00	1.00	564,823.00*							
			<u>1,420,791.50</u>			1,420,791.50	107,906.44	224,487.65	6,213,891.87	1947

ing December 1, 1947, pursuant to an amendment to Article 7(e) of the Plan, cash dividends on any of the 200,000 shares of stock held by the Fund were considered for all purposes of the Plan to be in the Dividend Account as of the record or the determination of stockholders entitled to receive such dividends.

SCHEDULE 1
(Page 5)

Date	Of Record	Share	Per Share Present Stock	Amount	Dividend Applied		Withdrawals from Dividend Account		Balance in Account		Year
					Cost 50,000 Shares	Expenses	Dividend Account	Retirements	Otherwise	December 31	
4/8	3/8/48	\$.50	\$.50	\$ 282,411.50							
4/8	6/10/48	.50	.50	282,411.50							
4/8	9/9/48	.50	.50	278,548.00							
4/9	12/16/48	1.00	1.00	557,096.00							
				<u>1,400,467.00</u>			1,400,467.00	112,581.68	271,158.80	7,230,618.39	1948
4/9	3/7/49	.50	.50	278,548.00							
4/9	6/10/49	.50	.50	278,509.00							
4/9	9/8/49	.50	.50	273,828.50							
5/0	12/14/49	1.50	1.50	821,485.50							
				<u>1,652,371.00</u>			1,652,371.00	159,265.22*	205,619.24	8,518,104.93	1949
5/0	3/7/50	.50	.50	273,828.50							
5/0	6/9/50	.50	.50	273,828.50							
5/0	9/8/50	.50	.50	267,539.00							
5/1	12/14/50	2.00	2.00	1,070,156.00							
				<u>1,885,352.00</u>			1,885,352.00	248,287.73	212,336.32	9,942,832.88	1950
5/1	3/7/51	.50	.50	267,539.00							
5/1	6/7/51	.50	.50	267,539.00							
5/1	9/7/51	.50	.50	259,950.50							
5/2	12/14/51	1.75	1.75	909,826.75							
				<u>1,704,855.25</u>			1,704,855.25	348,895.13	212,926.07	11,085,866.93	1951
5/2	3/7/52	.50	.50	259,950.50							
5/2	6/6/52	.50	.50	259,950.50							
5/2	9/5/52	.50	.50	249,562.00							
5/3	12/15/52	2.00	2.00	990,248.00							
				<u>1,767,711.00</u>			1,767,711.00	524,320.55	391,437.28	11,937,820.10	1952
5/3	3/6/53	.50	.50	249,562.00							
5/3	6/5/53	.50	.50	249,562.00							
5/3	9/4/53	.50	.50	241,877.00							
5/4	12/15/53	2.00	2.00	967,508.00							
				<u>1,708,509.00</u>			1,708,509.00	417,948.75	340,096.80	12,888,282.55	1953

includes \$590.09 for W. E. Keith. See foot note on Page 3 of this Schedule.

SCHEDULE 1
(Page 6)

42.

A. The charts appearing in paragraphs 38, 39, 40 and 40-a have been submitted on behalf of the plaintiffs; Schedule 1 which includes Tables A-G appearing in paragraph 41 above has been submitted on behalf of the defendants.

B. The difference in the year-end figures of participants' contributions as shown in plaintiffs' chart in paragraph 38, on the one hand, and in Schedule 1, Table E in paragraph 41, on the other hand, arises from the following circumstances:

(i) In plaintiffs' chart the year-end balance of participants' contributions is shown on a cash receipts basis.

(ii) The year-end figures of participants' contributions appearing in Table E of Schedule 1 in paragraph 41 above are taken from the books of account of the Fund maintained by the Administrative Committee of the Plan and are upon an accrual basis, that is to say, participants' contributions have been treated as though they were in the Fund at the end of the year in which their compensation was earned rather than in the subsequent year in which such compensation was paid. Participants' contributions are credited to their accounts on this accrual basis.

C. The dividend chart set forth in paragraph 39 above submitted on behalf of the plaintiffs and the comparable Table G appearing in Schedule 1 of paragraph 41 above submitted on behalf of defendants are in agreement except with respect to dividends paid after December, 1947. The plain-

tiffs' chart sets forth all such dividends as being in the Fund on the date when they were actually paid to the Trustee and the defendants' table set them forth as being in the Fund as of the date of record of each dividend in accordance with an amendment made to the Plan in December, 194 (Ex. 37). Dividends are credited to the Dividend Account on this basis.

D. The difference in the year-end figures of Company excess profits contributions as shown in plaintiffs' chart in paragraph 40, on the one hand, and Schedule 1, Table F, in paragraph 41, on the other hand, arises from the following circumstances:

(i) In plaintiffs' chart the year-end balance of Company contributions is shown on a cash receipt basis.

(ii) The year-end figures of Company contributions appearing in Table F of Schedule 1 in paragraph 41 above are taken from the books of account of the Fund maintained by the Administrative Committee of the Plan and are upon an accrual basis, that is to say, Company contributions have been treated as though they were in the Fund at the end of the year in which they were earned from profits upon which such contributions were based rather than in the subsequent year in which such contributions were paid to the Trustee. Company contributions are credited to participants' accounts on this accrual basis.

The total credits of participants in the Plan as of December 31, 1950, the last year prior to the commencement of this action, and as of December 31, 1953 are shown below, together with the sources of these credits:

	December 31, 1950	December 31, 1953
Contributions to Fund by participants	\$29,219,507.64	\$35,951,800.00
Excess Profits Account	9,853,754.00	13,455,255.00
Dividend Account	9,942,832.23	12,888,282.00
Earnings, as defined in the Plan	732,132.10	618,308.00
Dividends credited by insurance companies to June 30	774,593.95	2,712,945.00
Total	<u>\$50,532,820.57</u>	<u>\$65,636,590.00</u>
Such credits were covered by:		
Cash on deposit	\$ 651,653.17	\$ 22,897.00
U. S. Government Securities (at cost plus accrued interest)	1,698,141.11	3,023,690.00
Dividends receivable on J.C. Penney Company stock	1,070,156.00	967,508.00
Interest receivable on investments		
Balance of contributions receivable from Company	889,800.00	908,471.00
Contributions receivable from participants	4,462,762.98	4,426,352.00
Payments to insurance companies for deferred annuities	38,007,865.00	51,219,831.00
Dividends credited by insurance companies to June 30	774,593.95	2,712,945.00
Less:	<u>\$47,554,973.07</u>	<u>\$63,311,695.00</u>
Amounts due to former participants	\$ 8,489.49	\$ 17,300.00
Accrued Expenses	13,894.31	7,800.00
	<u>22,383.80</u>	<u>25,101.00</u>
Balance, to be covered by future annual Company contributions measured by salaries under Article 6(a) of the Plan	<u>\$47,532,589.27</u>	<u>\$63,336,596.00</u>
On December 31, 1950 the Trustee held 535,078 shares of Penney Company stock (with market price of \$4,983,995) for distribution to participants reaching retirement status; on December 31, 1953 the Trustee held 483,754 shares (with market price of \$4,039,673). From the original block of 50,000 shares, the cost of which was covered by September, 1946, there remained, after giving effect to the three-for-one stock split in January, 1946, 85,078 shares on December 31, 1950 and on December 31, 1953, respectively; the balance of 414,676 shares is carried in the accounts of the Fund at its cost of	<u>\$3,000,231.30</u>	<u>\$2,350,003.70</u>
	<u>\$50,532,820.57</u>	<u>\$65,636,590.00</u>
Less: Reserve for Retirement Account to which Company's annual contributions measured by salaries under Article 6(a) of the Plan were credited aggregating	<u>\$4,500,000.00</u>	<u>\$4,500,000.00</u>
	<u>\$1,499,763.70</u>	<u>\$2,149,996.23</u>
	<u>\$3,000,231.30</u>	<u>\$2,350,003.70</u>

The entries with regard to participation in the Retirement Plan of members of the Board of Directors of the Pennay Company during the period Dec. 31, 1944

through

Dec. 31, 1944

1945

1946

1947

1948

1949

1950

1951

Statement of Agreed Facts

Non-Participants

Pennay
Sams
Eyer
Buchnell
Day

Non-Participants

Pennay
Sams
Eyer
Buchnell
Day

Non-Participants

Pennay
Sams
Eyer
Buchnell
Herbert
Rosa

Non-Participants

Pennay
Sams
Eyer
Buchnell
(resigned as Director July 1)
Herbert
Rosa

Non-Participants

Pennay
Sams
Eyer
Herbert
Rosa

Non-Participants

Pennay
Sams
Eyer
Herbert
Rosa

Non-Participants

Pennay
Sams
Eyer
Herbert
Rosa
Binzen
(from July 1)

Non-Participants

Pennay
Sams
Eyer
Herbert
Rosa
Binzen
Hughes
(from July 1)

Non-Participants

Pennay
Eyer
Herbert
Ross
Binzen
Hughes
(from July 1)

Participants

Herbert
Rose
Crocker
Reynolds
Binzen
Hughes

Participants

Herbert
(retired under Plan July 1)
Ross
(retired under Plan July 1)
Crocker
(died Aug. 2)
Reynolds
Binzen
Hughes

Participants

Reynolds
Binzen
Hughes
Bantz
Brown

Participants

Reynolds
(retired under Plan & resigned as Director July 1)
Binzen
Hughes
Bantz
Brown
Mack
Schwamb

Participants

Binzen
Hughes
Bantz
Brown
Mack
Schwamb

Participants

Binzen
(retired under Plan July 1)
Hughes
Bantz
Brown
Mack
Schwamb
Torrrey
(elected Director Dec. 5)

Participants

Binzen
Hughes
(retired under Plan July 1)
Bantz
Brown
Mack
Schwamb
Torrrey

Participants

Hughes
(retired under Plan July 1)
Bantz
Brown
Mack
Schwamb
Torrrey

January 1, 1940 through December 31, 1951 as shown below:

Pe 8481 Pre-trial Order

The individuals listed under the caption "Jan. 1, 1940 through Dec. 31, 1944" comprised the Board of Directors on December 5 and 6, 1939 when the Plan was adopted by the Board of Directors subject to the approval of the stockholders and on those dates and thereafter while they served as Directors, Messrs. Penney, Sams, Bushnell, Hyer and Day were ineligible to participate in the Plan because they were not receiving any remuneration for their services from the Company.

During the period 1940 through 1951 the participation of officers of the Company who did not serve as directors was as follows:

Mr. Raskopf, Secretary, participated from January 1, 1940 through 1951; Mr. Trown, Comptroller, participated from 1940 until his resignation November 30, 1945; Mr. Weideman, who was elected successor to Mr. Trown on November 30, 1945, participated from 1940 through 1951.

45.

The chart set forth below shows the regular salary, the compensation from the General Office Compensation Fund and the contributions to the Retirement Plan from such compensation, for the years of participation, of each person who served as a director or officer of the Penney Company during the period January 1, 1940 through December 31, 1951.

For Year		Penney Sams Bushnell Ryer Day	Herbert	Ross	Crocker	Reynolds	Binzen	Hughes	Bantz	Brown	Mack	Schwab	Torrey	Raskopf	Trown	Weideman
1939																
Salary	None		\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$ 7,000	\$10,000	\$ 8,500	\$ 7,125	\$10,000	\$10,000	\$ 9,000
Compensation	"		36,612	36,612	36,612	36,612	36,612	36,612	27,459	14,645	26,969	14,645	21,477	22,883	36,612	16,475
Plan Contrib.	"		12,204	12,204	12,204	12,204	12,204	12,204	9,000	-	8,989	1,000	-	3,500	12,204	5,491
1940																
Salary	None		10,000	9,166	10,000	10,000	10,000	10,000	10,000	7,000	10,000	10,000	8,575	10,000	10,000	9,000
Compensation	"		37,974	34,810	37,974	37,974	37,974	37,974	28,481	15,189	37,450	18,987	21,925	23,734	37,974	17,088
Plan Contrib.	"		12,658	11,603	12,658	12,658	12,658	12,658	9,493	5,063	12,483	6,329	7,308	7,911	12,658	5,696
1941																
Salary	None		10,000	9,166	10,000	10,000	10,000	10,000	10,000	7,750	10,000	10,000	9,375	10,000	10,000	9,000
Compensation	"		62,058	56,887	62,058	62,058	62,058	62,058	46,543	24,823	83,484	38,786	37,034	46,543	62,058	27,926
Plan Contrib.	"		20,686	18,962	20,686	20,686	20,686	20,686	15,514	8,274	27,828	12,928	12,344	15,514	20,686	9,308
1942																
Salary	None		10,000	10,000	10,000	10,000	10,000	10,000	10,000	8,416	10,000	10,000	9,733	10,000	10,000	6,750
Compensation	"		71,155	71,155	71,155	71,155	71,155	71,155	53,366	30,240	104,443	44,471	54,914	53,366	71,155	24,014
Plan Contrib.	"		14,231	14,231	14,231	14,231	14,231	14,231	10,673	6,048	20,888	8,694	10,982	10,673	14,231	4,802
1943																
Salary	None		10,000	10,000	10,000	10,000	10,000	10,000	10,000	8,874	10,000	10,000	10,000	10,000	10,000	7,500
Compensation	"		64,404	64,404	64,404	64,404	64,404	64,404	48,303	28,981	59,430	40,252	47,285	46,303	64,404	24,151
Plan Contrib.	"		12,880	12,880	12,880	12,880	12,880	12,880	9,660	5,796	11,886	8,050	9,457	9,660	12,880	4,830
1944																
Salary	None		10,000	10,000	10,000	10,000	10,000	10,000	10,000	9,666	10,000	10,000	10,000	10,000	10,000	9,000
Compensation	"		67,365	67,365	67,365	67,365	67,365	67,365	50,524	33,682	61,777	42,103	37,524	50,524	67,365	30,314
Plan Contrib.	"		13,473	13,473	13,473	13,473	13,473	13,473	10,104	6,736	12,355	8,420	7,504	10,105	13,473	6,062
1945																
Salary	None		5,860	5,860	5,905	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	9,166	9,500
Compensation	"		29,212	29,212	34,348	58,584	58,584	58,584	51,261	43,938	53,146	51,261	38,809	51,261	53,609	29,292
Plan Contrib.	"		None	None	None	11,716	11,716	11,716	10,252	8,787	10,628	10,252	7,761	10,252	None	5,658
1946																
Salary	None		None	None	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"				69,092	69,092	69,092	69,092	69,092	69,092	69,092	69,092	69,092	69,092	69,092	43,162
Plan Contrib.	"				13,818	13,818	13,818	13,818	13,818	13,818	13,818	13,818	7,546	13,818		8,636
1947																
Salary	None		"	"	5,371	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"	32,996	66,173	66,173	66,173	66,173	66,173	66,173	66,173	57,970	66,173	66,173	49,630
Plan Contrib.	"		"	"	None	13,234	13,234	13,234	13,234	13,234	13,234	13,234	11,594	13,234		9,926
1948																
Salary	None		"	"	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"	88,825	88,825	88,825	88,825	88,825	88,825	88,825	88,825	88,825	88,825	88,825	66,618
Plan Contrib.	"		"	"	17,765	17,765	17,765	17,765	17,765	17,765	17,765	17,765	17,765	17,765	17,765	13,323
1949																
Salary	None		"	"	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"	75,990	75,990	75,990	75,990	75,990	75,990	75,990	75,990	75,990	75,990	75,990	75,990
Plan Contrib.	"		"	"	15,198	15,198	15,198	15,198	15,198	15,198	15,198	15,198	15,198	15,198	15,198	15,198
1950																
Salary	None		"	"	5,860	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"	46,472	93,200	93,200	93,200	93,200	93,200	93,200	93,200	93,200	93,200	93,200	93,200
Plan Contrib.	"		"	"	None	18,640	18,640	18,640	18,640	18,640	18,640	18,640	18,640	18,640	18,640	18,640
1951																
Salary	None		"	"	None	5,837	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"	"	42,217	84,666	84,666	84,666	84,666	84,666	84,666	84,666	84,666	84,666	84,666
Plan Contrib.	"		"	"	"	None	16,933	16,933	16,933	16,933	16,933	16,933	16,933	16,933	16,933	16,933
Stats to Retirement or Separation																
Salary			\$ 65,860	\$ 64,192	\$ 65,905	\$ 85,871	\$115,860	\$125,887							\$ 69,166	
Compensation			368,780	360,445	373,916	500,240	744,704	833,649							393,177	
Plan Contrib.			86,133	83,355	86,132	111,669	157,667	176,503							86,132	
Stats Retired Separated																
			7-1-1945	7-1-1945	8-2-1945	7-1-1947	7-1-1950	7-1-1951							11-30-1945	

46.

Manager's contracts for 1939 and 1940 were identical with Exhibits 185 and 186, aside from the percentages shown on the first page of such Exhibits, and except that contracts for managers in stores whose sales were not expected to exceed \$600,000. contained no clause in paragraph Second (a) following the percentages shown nor the percentage figures listed on the reverse side of Exhibits 185 and 186 as applicable to sales over \$600,000.

* * * * *

49.

On July 22, 1941 the Board of Directors of the Penney Company in a meeting at which directors J. I. H. Herbert, G. H. Crocker, W. A. Reynolds, E. A. Ross, A. W. Hughes and F. W. Binzen were present adopted, with reference to subdivision (a) of Article 8, the resolutions set forth below (Ex. 13):

"The question was then presented to the meeting as to whether Mr. Dan Pearson, who has tendered his resignation as Manager of the Salem, Ohio, store and Mr. A. McAlpine, who has tendered his resignation as Manager of the Bellefontaine, Ohio, store and who as at July 1, 1941, were over 64 and 67 years of age, respectively, shall for the purposes of the Company's Profit-Sharing Retirement Plan for its Management Staff be considered as having retired pursuant to Paragraph 8(a) of the Plan, and accordingly eligible for a paid-up non-assignable annuity and shares of the stock out of the

Trust Fund. After discussion, it was agreed that their severance of their employment with the Company should not be considered as retirements but as a separation from the Company other than retirement, and that any other such cases occurring prior to January 1, 1945, shall likewise be determined to be separations other than retirements from active salaried employment for the purposes of the Plan, except that consideration may be given by the Board to cases where special circumstances of an unusual type may be involved in the severance of the employment with the Company where the participant shall have attained the age of sixty (60) years, and

Upon motion duly made, seconded and unanimously carried, it was

Resolved, That the resignation of Dan Pearson from the management of the Company's store at Salem, Ohio, and the resignation of A. McAlpine from the management of the Company's store in Bellefontaine, Ohio, who as at July 1, 1941, were over 64 and 67 years of age respectively, shall not be considered as retirement from active salaried employment for purposes of the Company's Profit-Sharing Retirement Plan for its Management Staff, and

Further Resolved, That for the purposes of said Plan, resignations up to January 1, 1945, of participants in the Plan who have attained, or attain, the age of sixty (60), shall likewise be considered as separations, other than retirements, from active salaried employment, except that the Board may

give consideration to the severance of employment with the Company by a participant who shall have attained the age of sixty (60) years in which there may be special circumstances of an unusual type involved."

50.

On December 5, 1944 the Board of Directors in a meeting at which directors J. C. Penney, E. C. Sams, George H. Bushnell, Wilk Hyer, G. H. Crocker, W. A. Reynolds, E. A. Ross, A. W. Hughes and F. W. Binzen were present adopted, with reference to subdivision (c) of Article 8, the resolutions set forth below (pp. 1565-66 of Ex. 23):

"Mr. Hughes then stated that inquiries have been received from a number of store managers who will have attained the age of 55 but not the age of 60 years during 1945, as to whether the Company will permit their retirement under Provision 8(c) of the Management Staff Profit-Sharing Retirement Plan, with full retirement benefits. Reference was made to the fact that in connection with the cases of Messrs. Pearson and McAlpine, who resigned from store management in 1941 and who were then over 60 years of age, the Board held that their resignations would not be considered for Plan purposes as 'Retirements From Active Salaried Employment' under Provision 10.A., and they accordingly received, in cash, the amounts standing to their credit in the Trust Fund in accordance with Provision 10.B. At that time the Board also held that, for purposes of the Plan, resignations up to January 1, 1945, of participants who have attained,

the first day of July in the year in which they reach age sixty, and that the discretionary power granted the directors in the Plan to permit retirement with such benefits of a participant who has attained the age of fifty-five years shall be exercised only when exceptional circumstances would warrant. Mr. Hughes stated that inquiries have been received from participants on this matter, and asked how such inquiries should be handled.

After discussion, it was agreed that replies to such inquiries in line with the Directors' decision should be made by Mr. Hughes, and

Upon motion duly made, seconded and unanimously carried, it was

Resolved, That inquiries as to whether a participant in the Plan would be permitted to retire after age fifty-five and before age sixty and receive an annuity and stock shall be answered by Mr. Hughes in line with the decision of the Board of Directors made in its meeting of December 5, 1944, as hereinabove referred to."

52.

Article 17 of the Plan as distributed to participants in 1940 read as follows:

"17. The Board of Directors shall have the right to alter, modify, or amend in whole or in part, any of the provisions of this or any incidental plan, provided, however, that such alterations, modifications, or amendments shall not in any way be in contravention of the provisions of Article '16.'"

Article 16 of the Plan read as follows:

"16. J. C. Penney Company does not guarantee

any of the benefits provided in this Plan, but contributions once made by the Company shall be irrevocable and no part of the Fund in the possession of the Trustee, excepting so much of the moneys for which it may be reimbursed for expense of operation of the plan, shall ever revert to the Company or be diverted to or used for any purposes other than for the exclusive benefit of eligible employees covered by the Plan."

There has been no change in Articles 16 or 17 of the Plan since the distribution of the Plan and Trust Agreement (Ex. 125) in 1940, except that on February 24, 1948, following preparation of contracts for the purchase of deferred annuities from four insurance companies, the Board of Directors of the Penney Company amended Article 16 to add after the words "benefits provided in this Plan" the words "or contemplated by the terms of any contract entered into with an insurance company or companies for the purchase of retirement annuities" (Item 13. pp. 1806-07 of Ex. 39).

53.

On May 25, 1948 the Board of Directors of the Penney Company in a meeting at which directors E. C. Sams, J. I. H. Herbert, E. A. Ross, A. W. Hughes, F. W. Binzen, J. F. Brown, F. A. Bantz, G. E. Mack, H. H. Schwamb were present adopted the following resolution (pp. 1825-27 of Ex. 40):

"Mr. Hughes then brought up for discussion the question of the elimination of the provision in the Company's Profit-Sharing Retirement Plan (for

Management Staff) under which it is optional with the Company, in the discretion of the Board of Directors, to permit retirement of participants who have attained, or attain, the age of 55 years. He stated that while this provision of the Plan became effective January 1, 1945, no participant has been granted permission to retire before age 60 with full Plan benefits, that is, a paid-up non-assignable annuity and shares of stock from the block of stock held by the Trustee of the Plan for distribution to retiring participants. Mr. Hughes also stated that the matter had been considered on a number of occasions and that District Managers and those who may have inquired have been informed that retirement with full benefits would not be permitted before a participant reaches age 60. He therefore recommended, since it is not contemplated that retirements at age 55 will be permitted, that the provision contained in Article 8(c) of the Plan be deleted. After discussion, it was agreed that such recommendation should be adopted, and

Upon motion duly made, seconded and unanimously carried, it was

Resolved, That the Profit-Sharing Retirement Plan (for Management Staff) be, and it hereby is amended by deleting Article 8 and substituting therefor the following Article:

8. Retirement of participating employees shall be governed by the following condition:

(a) Retirement shall be compulsory for those

participants who have attained or attain the age of 60 years, except that in special cases the Board of Directors, in its discretion, may delay from year to year the separation of any such employee from the company's employment, but such persons must, nevertheless, withdraw from participation in the Plan at the retirement age of 60 years.

(b) The applicable retirement age for compulsory retirement of all participants shall be deemed to have been reached on the first day of July of the calendar year in which he or she attains such age.

(c) A participant shall be deemed to have attained a given age under the Plan on the first moment of the anniversary of his birth corresponding to such age.

and by deleting the last sentence set forth under (a) of the provision at the end of the plan captioned "Effective Dates:" which reads as follows:

However, if any participant shall cease active employment prior to July 1, 1942 his or her own contributions to the Fund from 1939 compensation and other participants' contributions to the Fund from 1939 compensation shall not be used in measuring the number of shares of the J. C. Penney Company common stock to which he or she is entitled in any retirement settlement.

and

Further Resolved, That the foregoing amendment shall be effective May 25, 1948."

There has been no amendment to Article 8 of the Plan since May 25, 1948.

* * * * *

55.

After the Group Annuity Contracts became effective, plaintiffs Wells and Albertsen and all other participants received from the Administrative Committee of the Retirement Plan a booklet issued by the Committee entitled "Outline of Benefits Under & Provisions of Group Annuity Contracts Effective March the First, 1948" (Ex. 280).

56.

On or about August 25, 1949, the Administrative Committee of the Retirement Plan issued to all participants a new booklet entitled "J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff)" (Ex. 127) containing, among other things, the Plan and Trust Agreement as amended. The only amendments which have been made to the Plan since the distribution of such booklet are the amendments to Article 6(b) and Article 9 of the Plan (pp. 2000, 2004 to 2006 of Ex. 51), made in December 1950, effective January 1, 1951.

57.

There was no withdrawal by any participant over 60 under the Plan during the calendar year 1940. During the period between January 1, 1941 and July 1, 1945, participants who were over 60 with birth date as shown below and whose participation ceased on the dates shown below opposite the name

of each, had at the time of ceasing participation personal contributions and total credits in the Fund as shown. There is also shown, except in the case of those participants whose participation ceased on account of death, the shares of J. C. Penney Company stock each participant would have received had he reached retirement status on July 1 of the year of his separation.

NAME	Position	Date Out	Date of Birth	Personal Contributions at Time of Leaving	Total Plan Credits at Time of Leaving	Shares of Stock	See Footnote
S. J. Foote Dan Pearson A. F. Alpize	SM - # 381, Ottava, Kansas	3/31/41	5/ 8/79	\$ 678.60	\$ 784.87	43	129
	SM 445, Salem, Ohio	6/30/41	12/11/76	2,437.77	2,623.65	75	225
	SM 349, Bellefontaine, Ohio	8/31/41	8/20/73	4,278.38	4,635.05	146	438
J. T. Chambers C. A. Wharton R. D. Dickinson	SM 132, Salem, Oregon	12/31/41	10/12/80	13,514.90	16,348.36	253	759
	SM 716, Lufkin, Texas	4/11/42	11/15/80	1,967.89	2,539.06	37	111
	SM 107, Eugene, Oregon	12/31/42	10/15/82	16,622.40	22,711.74	229	637
	SM 527, Pottstown, Penna.	2/28/43	8/ 4/77	7,203.64	9,763.65	98	297
B. E. Fuzz E. T. Shinogle	SM 305, Lorain, Ohio	5/22/43	2/14/80	9,684.95	13,186.47	Deceased	120
	SM 961, Bluffton, Indiana	6/30/43	10/12/82	2,894.67	4,041.12	40	
	SM 833, Glasgow, Montana	7/20/43	9/11/78	7,755.10	10,385.08	107	321
J. A. Graver T. S. Willis P. W. Bearer	SM 822, Penseleuer, Ind.	8/31/43	5/ 2/74	5,980.88	8,180.10	82	246
	SM 1119, Torrington, Wyo.	9/29/43	9/11/77	4,145.19	5,811.14	Deceased	
	SM 497, Petersburg, Va.	6/ 2/44	4/14/81	20,670.02	29,810.45	Deceased	
Chas. Ealer H. C. Hoagland O. A. Cleseler	SM 155, Salt Lake City, Utah	6/17/44	8/28/79	43,694.56	63,101.46	Deceased	
	SM 350, Winona, Minn.	6/30/44	12/14/81	8,555.87	12,577.61	98	294
	Buyer - Dept. H. - New York	11/12/44	4/ 5/84	34,371.44	50,712.83	Deceased	
M. D. Warner G. C. Taylor	SM - # 204, Kirkeville, Mo.	2/26/45	3/15/82	7,827.78	11,468.40	Deceased	

FOOTNOTE: Shares in preceding column multiplied by three to allow for the three-for-one stock split January 16, 1946. (See paragraph 10 above)

The column headed "Shares of Stock" indicates the number of shares of J. C. Penney Company stock, on the basis of the personal contributions shown, the participant would have received had he reached retirement status on July 1 of the year of his separation. Where the separation occurred before July 1 of a year, the participant's personal contributions were assumed to have been in the Fund on July 1. Where the separation occurred on December 31 of a year, the assumption has been made that the participant reached retirement status on the July 1 of the succeeding year since the amount of his personal contributions shown includes those based on compensation earned in the year of separation and paid into the Fund in the next year.

The following example illustrates the method used in computing the number of shares of stock shown above and in making the similar computations in the chart set forth in paragraph 60, V. S. Wennersten being the participant used in this example.

Total of participants' contributions in	
Fund July 1, 1943.....	\$10,860,627.96
Aggregate personal contributions of Messrs.	
Dickinson, Wennersten, Huse and	
Shinogle from above.....	36,405.66
<hr/>	
Revised total of participants' contributions	
in Fund July 1, 1943.....	10,897,033.62
Wennersten's contributions	
at time of leaving.....	\$ 7,203.64 = 00.0661064%
<hr/>	
Revised total participants'	
contributions	\$10,897,033.62
00.0661064% of 150,000 shares equals 99 shares.	

Participants' contributions from 1939 compensation have been excluded in computing the number of shares of stock shown for Messrs. Foote, Pearson and McAlpine in accordance with the provisions of the Plan on page 36 under the caption "Effective Dates" since their dates of separation occurred before July 1, 1942 and they have been considered to have retired on July 1, 1941, for such computations.

58.

There is shown below the names of those participants who were over 60 or who attained age 60 during the period between January 1, 1941 and January 1, 1945, and who reached retirement status on July 1, 1945, together with their personal contributions and total credits in the Fund on that date and the number of shares of J. C. Penney Company stock they received.

B. C. Goss	Dept. Z - New York	6/13/84	\$ 15,076.83	98
J. I. H. Herbert	Director, Vice President & Treasurer	2/3/82	6,362.81	42
J. M. Johnson	Head Buyer - Dept. A - New York	2/4/84	127,256.17	830
L. A. Martin	Asst. Sales Mgr. - New York	2/7/84	79,533.60	519
B. A. Ross	Director - Head Real Estate & Construction	12/2/83	79,379.89	510
L. M. Szymon	SM - Store # 54, Gallup, N. M.	12/2/83	123,320.85	803
J. T. Mahan	SM " 89, Fort Madison, Iowa	4/11/84	6,461.54	82
H. A. Hansen	SM " 142, Virginia, Minn.	3/15/83	12,506.53	80
R. E. Finney	SM " 158, Paris, Texas	4/22/82	12,159.02	80
A. M. Kibly	SM " 191, Enid, Okla.	3/22/79	7,984.88	54
C. W. Coleman	SM " 206, Parkersburg, W. Va.	6/17/84	14,893.81	95
G. H. Kennedy	SM " 213, Miami, Okla.	2/8/84	13,134.15	127
J. B. Atkinson	SM " 225, Fond du Lac, Wisc.	10/10/84	19,781.45	87
M. H. Hanafield	SM " 255, Tucson, Ariz.	10/29/84	13,287.40	110
S. E. Axe	SM " 319, Spencer, Iowa	11/29/81	15,867.75	153
C. F. Stadtfeld	SM " 363, Watertown, R. D.	6/20/82	23,131.17	203
L. J. Hinkel	SM " 398, New Castle, Ind.	12/15/79	35,119.07	99
J. M. Moffatt	SM " 411, Coshocton, Ohio	11/12/83	15,675.73	151
R. E. Auble	SM " 465, Wray, Colorado	8/6/84	12,468.57	120
Z. C. Buech	SM " 469, McKeesport, Penna.	10/30/80	14,131.12	90
J. M. Higginbotham	SM " 477, Peru, Indiana	2/26/84	2,975.01	29
C. F. Sutherland	SM " 534, LaGrange, Ga.	12/2/79	15,951.77	154
O. S. Welch	SM " 540, Winfield, Kansas	6/30/84	5,350.93	52
D. C. Book	SM " 605, Alexandria, Va.	11/15/83	9,747.81	94
E. F. Fahrendorf	SM " 641, Sioux Falls, S. D.	2/9/84	2,408.76	25
Y. S. Davies	SM " 660, Denver, Colorado	1/3/84	30,457.50	294
X. G. Cornell	SM " 665, Albion, Michigan	7/18/83	25,729.92	248
R. R. Kinton	SM " 741, Martinsville, Ind.	6/20/84	11,755.52	113
H. O. Boelter	SM " 846, Montevideo, Minn.	3/27/84	6,782.06	65
L. M. Lerberg	SM " 879, Hutchinson, Minn.	12/25/82	6,239.77	60
T. E. Andrew	SM " 959, Banning, California	12/13/84	5,004.39	48
L. D. Mutter	SM " 1007, Weston, W. Va.	11/2/82	7,120.13	48
R. E. Cain	SM " 1050, Plainview, Texas	5/31/83	10,379.73	68
C. A. Nelson	SM " 1079, Redwood City, Calif.	10/25/83	2,927.54	28
R. A. Finney	SM " 1081, Coleman, Texas	11/6/78	4,513.84	35
H. A. Trost	SM " 1090, Santa Cruz, Calif.	7/29/83	5,313.96	78
H. W. Woods	SM " 1197, Sargant, Nebraska	12/31/82	11,951.08	56
O. Paris	SM " 1272, Tupelo, Miss.	9/24/82	8,668.47	55
J. O. Chamberlain	SM " 1299, Florence, Colo.	11/24/82	9,807.86	66
		9/23/84	2,097.11	20
		3/23/79	5,577.03	54
			2,400.00	23
			3,460.64	

FOOTNOTES: On January 16, 1946, the Company, in its three-for-one stock split, issued to the above individuals two additional shares for each of the shares set opposite their names then held by them.

During the period from January 1, 1945 to July 1, 1949,

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participants who were over 55 at the time of ceasing participation on the dates shown, with birth dates as shown, had personal contributions and total credits in the Fund as shown below. There is also shown, except in the case of those participants whose participation ceased on account of death, the shares of J. C. Penney Company stock each participant would have received had he reached retirement status on July 1 of the year of his separation.

NAME	Position	Date Out	Birth	Leaving	Stocks	Footnote
J. W. Stuebs	SM - # 450, Atlantic, Iowa	12/31/44	7/1/87	\$ 5,629.82	\$ 8,138.75	54 162
J. B. Carpenter	SM 534, Cape Girardeau, Mo.	5/15/45	5/1/87	11,373.93	16,815.84	109 327
J. G. Duns	SM 1295, Council Grove, Kans.	6/30/45	3/23/90	2,353.29	3,997.68	53 69
J. G. Collan	SM 1295, Council Grove, Kans.	7/14/45	4/1/90	11,089.42	16,862.41	107 321
C. E. Crocker	Director - Gen. Mgr. of Subsidiary	8/2/45	7/19/87	86,133.73	127,256.17	Deceased
J. W. Irwin	SM - # 371, Marquette, Michigan	11/7/45	9/1/88	4,767.17	7,231.67	46
J. A. Henry	SM 176, Greenwood, Texas	12/6/45	1/15/89	13,661.53	20,272.29	Deceased
J. A. Snell	SM 38, Eaton, New Mexico	12/31/45	8/11/90	3,532.30	5,244.16	9723
J. O. Olson	SM 380, Kelso, Washington	12/31/45	7/21/90	6,235.36	9,465.44	171
J. L. Johnson	Accounting Dept - New York	12/31/45	7/2/86	9,754.63	14,705.18	267
J. L. Tucker	SM - # 600, Bellevue, Ohio	1/30/46	4/13/90	3,809.83	5,717.94	104
J. L. Delle	SM 174, Peoria, Idaho	6/30/46	8/29/90	16,043.25	24,598.84	439
J. L. Perry	SM 146, Las Vegas, Nevada	2/28/46	2/28/91	16,277.02	25,863.07	445
J. E. Mahine	SM 669, Springfield, Minn.	12/31/46	6/31/89	1,666.56	2,512.84	39
J. F. McLean	SM 661, Childress, Texas	12/31/46	2/22/98	10,972.59	17,623.82	266
J. F. Jefferson	SM 783, Idaho Falls, Idaho	12/31/46	5/17/91	17,623.59	27,802.42	427
J. V. Wallman	SM 1385, Bishop, California	6/30/47	6/16/92	4,623.89	7,477.21	112
J. H. Swisher	SM 154, Oakland, California	6/30/47	2/29/92	56,134.60	91,578.18	1359
J. C. Halbert	Buyer - Dept. F - New York	8/31/47	12/18/91	69,793.26	111,697.38	1690
J. A. Meleon	SM - # 551, Tyler, Texas	12/31/47	1/14/92	12,623.22	20,273.31	281
J. G. Johnson	SM 1020, Houston, Texas	12/31/47	12/15/90	75,543.86	123,616.72	1684
J. C. Campbell	SM 1436, Indianapolis, Ind.	12/31/47	10/7/92	51,145.19	83,778.02	1140
J. C. Deal	SM 2576, Knoxville, Calif.	3/31/48	8/30/91	6,014.47	13,300.13	179
J. F. Ruve	SM 575, Florence, Illinois	4/15/48	6/21/92	4,076.24	6,599.15	91
J. E. Reubolt	SM 158, Stockton, Calif.	8/28/48	4/10/90	49,728.85	80,964.37	Deceased
J. E. Draper	SM 195, Webster City, Iowa	10/24/48	6/22/90	7,310.03	11,834.65	Deceased
H. L. Jordan	SM 343, New Ulm, Minnesota	11/10/48	2/10/90	9,108.98	15,037.60	Deceased
H. F. Jorgensen	SM 461, Aberdeen, So Dakota	12/31/48	8/6/92	10,465.17	17,763.88	203
J. F. Bush	SM 320, Keosau, Iowa	5/18/49	9/18/93	20,038.83	33,756.65	Deceased
J. A. Burkitt	SM 217, Portland, Oregon	6/30/49	1/5/93	83,894.64	146,310.09	1629

The column headed "Shares of Stock" indicates the number of shares of J. C. Penney Company stock, on the basis of the personal contributions shown, the participant would have received had he reached retirement status on July 1 of the year of his separation. Where separation occurred before July 1 of a year, the participant's personal contributions were assumed to have been in the Fund on July 1. Where the separation occurred on December 31 of a year, the assumption has been made that the participant reached retirement status on the July 1 of the succeeding year since the amount of his personal contributions shown includes those based on compensation earned in the year of separation and paid into the Fund in the next year.

Recommencing with P. A. Bush, the number of shares reflects the three-for-one split of the Company's stock on January 16, 1946.

NOTES: Shares in preceding column multiplied by three to allow for the three-for-one stock split January 16, 1946. (See paragraph 10 above)

The names of the participants totaling 134 who reached retirement status in the years 1945 through 1949, together with the credits in the Fund of each and the number of shares of stock they received from the Fund, are shown on Exhibits 67 through 71.

61.

The chart set forth below shows the participation in and withdrawals from the Plan during the period January 1, 1940 through December 31, 1953, with the number of participants who separated for reasons other than retirement segregated by the age brackets shown.

Participants						Other 8	
Beginning of Year	Withdrawing				End of Year	Under 35	
	New	Death	Retire- ments	Other Reasons		Death	Other Reasons
,716*	-	1		3	1,712	-	-
,712	102	5		78	1,731	1	7
,731	120	3		59	1,789	-	3
,789	57	9		38	1,799	-	-
,799	72	6		50	1,815	-	-
,815	85	8	50	70	1,772	-	-
,772	134	10	17	86	1,793	-	1
,793	141	6	16	79	1,833	-	4
,833	113	13	23	67	1,843	-	1
,843	135	7	28	70	1,873	-	-
,873	117	10	30	58	1,892	-	1
,892	114	8	35	59	1,904	-	-
,904	146	7	40	64	1,939	-	-
,939	<u>118</u>	<u>9</u>	<u>33</u>	<u>60</u>	1,955	<u>-</u>	<u>-</u>
	1,454	102	272	841		1	17

Participants initially in the Plan.

62.

On July 1, 1949, after distribution of shares to participants who retired on July 1 of the years 1945 through 1949, the Trustee held in the Fund 547,657 shares of J. C. Penney Company common stock for distribution to retiring participants. If each person (other than those shown as deceased) listed in paragraphs 57 and 59 had been permitted to retire under Article 8(a) or 8(c), the number of shares remaining in the original 50,000 share block on July, 1949 would have been 82,390 shares, after giving effect to the three for one split on January 16, 1946.

63.

On July 1, 1951, after distribution of shares to participants who retired on July 1 of the years 1945 through 1951, the Trustee held in the Fund 519,901 shares of J. C. Penney Company common stock for distribution to retiring participants. If each person (other than those shown as deceased) listed in paragraphs 57 and 59 had been permitted to retire under Article 8(a) or 8(c), the number of shares remaining in the original 50,000 share block on July 1, 1951 would have been 54,634 shares, after giving effect to the three for one split on January 16, 1946.

64.

On or about November 12, 1940 the United States Treasury Department issued a ruling that the Retirement Plan met the requirements of Section 165 of the Internal Revenue Code and therefore quali-

fied as an employees' trust entitled to exemption from Federal income taxes (Ex. 310). Subsequent to the amendment of Section 165 by the Revenue Act of 1942, the Treasury Department on or about December 21, 1944 issued a ruling that the Plan met the requirements of Section 165(a) of the Internal Revenue Code as amended and therefore qualified as an employees' trust entitled to exemption from Federal income taxes (Ex. 311). The Treasury Department has also determined that amendments to the Plan submitted to it from time to time do not affect the Plan's continued qualification as an employees' trust entitled to exemption from Federal income taxes under the applicable provisions of Section 165 of the Internal Revenue Code (Ex. 312 A through D), and the Plan has so qualified at all times since its adoption.

65.

Plaintiff Wells, during the period of his participation in the Plan from January 1, 1940, to August 31, 1948, received from the Penney Company regular salary totaling \$29,955.00 and in addition Manager's Contract Compensation totaling \$56,924.-22. Plaintiff Wells, as permitted by the terms of the Plan, contributed to the Trust Fund under the Plan \$1,989.23 from his Contract Compensation for 1939. From his Contract Compensation for the years 1940 through 1947, plaintiff Wells, as required by the terms of the Plan, contributed to the Trust Fund under the Plan a total of \$11,904.47. The contribution made by plaintiff Wells from his

compensation for 1939, 1940 and 1941 was 331 $\frac{1}{3}$ % of his compensation for those years; for the years 1942 through 1947 it was 20%. Plaintiff Wells made no contribution to the Retirement Plan from his Contract Compensation for 1948 because such compensation was not for the full calendar year 1948 (Article 4, p. 24 of Ex. 125).

66.

While he was a participant in the Plan plaintiff Wells, in accordance with the provisions of Article 23 of the Plan (p. 34 of Ex. 125), received from the Administrative Committee of the Plan for each of the years 1940 through 1947 an annual statement of his account setting forth all of the credits to his account at the end of the year covered by the statement together with the source of such credits. With respect to each such statement plaintiff Wells executed and returned to the Administrative Committee a certificate in which he certified that the amounts of his own contributions were correctly stated (Ex. 254 A through H).

67.

On ceasing participation in the Retirement Plan on August 31, 1948, plaintiff Wells had total credits in the Fund of \$22,563.48 (Ex. 252), consisting of:

A.	the total of his own contributions	
	amounting to	\$13,929.70
B.	his share of the Company's excess profit contributions	
	through 1947 amounting to.....	4,075.52
C.	his share of the Dividend Account at	
	August 31, 1948, amounting to.....	4,558.26
		<hr/>
	Total	\$22,563.48

All these credits were used to purchase for him installment refund annuities under which payments would commence on August 1, 1955, the year in which he would be 60 (Ex. 249).

68.

Under the terms of the Retirement Plan and the Group Annuity Contracts, plaintiff Wells elected to cancel all the installment refund annuities so purchased for him and to receive his total credits of \$22,563.48 in cash (Ex. 251).

69.

Pursuant to his election under the terms of the Retirement Plan and the Group Annuity Contracts, plaintiff Wells received the \$22,563.48 from the Aetna Life Insurance Company on or about October 15, 1948 (Ex. 252); and on or about April 1, 1949 received the additional sum of \$643.83 representing his share of the distribution of the Reserve for Depreciation of Assets to which Fund earnings had been credited (Ex. 253).

70.

Plaintiff Albertsen during the period of his participation in the Plan from January 1, 1940 to December 31, 1950, received from the Penney Company regular salary totaling \$48,900.00 and in addition Manager's Contract Compensation totaling \$137,052.71. From such Contract Compensation plaintiff Albertsen, as required by the terms of the Plan, contributed to the Trust Fund under the

Plan a total of \$30,213.13. Plaintiff Albertsen did not make any contribution under the Plan from his Contract Compensation for 1939 although permitted to do so under the terms of the Plan. The contribution made by plaintiff Albertsen from his compensation for 1940 and 1941 was $33\frac{1}{3}\%$ of his compensation for those years; for the years 1942 through 1950 it was 20%.

71.

While he was a participant in the Plan plaintiff Albertsen, in accordance with the provisions of Article 23 of the Plan (p. 34 of Ex. 125; p. 14 of Sec. IV of Ex. 127), received from the Administrative Committee of the Plan for each of the years 1940 through 1949 an annual statement of his account setting forth all of the credits to his account at the end of the year covered by the statement together with the source of such credits. With respect to each such statement plaintiff Albertsen executed and returned to the Administrative Committee a certificate in which he certified that the amounts of his own contributions were correctly stated (Ex. 282 A through J).

72.

On ceasing participation in the Retirement Plan on December 31, 1950, plaintiff Albertsen had total credits in the Fund of \$52,967.81 (Ex. 215 D), consisting of:

A.	the total of his own contributions amounting to	\$ 30,213.13
B.	his share of the Company's excess profit contributions through 1950 amounting to.....	10,386.23
C.	his share of the Earnings credit through 1950 amounting to.....	1,104.89
D.	his share of the Dividend Account at December 31, 1950, amounting to.....	\$ 10,280.94
E.	his share of insurance companies' rate credits (dividends) under the Group Annuity Con- tracts amounting to.....	982.62
Total		<hr/> \$52,967.81

All these credits were used to purchase for him installment refund annuities under which payments would commence on August 1, 1956, the year in which he would be 60, which annuities are still in force. Plaintiff Albertsen's share of the rate credits (dividends) paid by the insurance companies in 1951, which share amounted to \$1,094.66, was applied by them as premium for additional installment refund annuities for him under which payments would commence on August 1, 1956 (Ex. 317) and such additional annuities are still in force.

73.

Neither plaintiff Wells nor plaintiff Albertsen at any time prior to the commencement of this action made any objection to the accounts or proceedings covered by either the annual statements of their accounts furnished to them (Ex. 254 A through H; Ex. 282 A through J) in accordance with Article 23 of the Plan or to the statements of the accounts of the proceedings of the Trustee

(Exs. 129 through 135 as to Wells: Exs. 129 through 138 as to Albertsen) which, as the plaintiffs were advised in their annual statements of account, were available for their inspection as provided in Article 23 of the Plan (p. 34 of Ex. 125; also as to Albertsen p. 14 of Sec. IV of Ex. 127).

74.

Each participant in the Plan in accordance with the provisions of Article 23 of the Plan (p. 34 of Ex. 125) received from the Administrative Committee of the Plan for each of the years of his participation in the Plan (except for the year in which his participation ceased) an annual statement of his account, in form similar to the annual statements of their accounts furnished to plaintiff Wells and plaintiff Albertsen (Ex. 254 A through H; Ex. 282 A through J), setting forth all of the credits to his account at the end of the year covered by the statement and the source of such credits. With respect to each such statement received each participant executed and returned to the Administrative Committee a certificate in which he certified that the amounts of his own contributions were correctly stated. No participant at any time prior to the commencement of this action made any objection to the accounts or proceedings covered by either the annual statement of his account furnished to him in accordance with Article 23 of the Plan or to the statements of the account of the proceedings of the Trustee which, as each participant was advised in his annual statement of ac-

count, were available for his inspection as provided in Article 23 of the Plan (p. 34 of Ex. 125; p. 14 of Sec. IV of Ex. 127).

75.

Glyndon H. Crocker and G. H. Crocker were the names used by the same individual, G. H. Crocker.

Walter A. Reynolds, Sr., and W. A. Reynolds are the names of the same individual, W. A. Reynolds.

Earl A. Ross and E. A. Ross are the names of the same individual, E. A. Ross.

Albert William Hughes, Albert W. Hughes and A. W. Hughes are the names of the same individual, A. W. Hughes.

Frederick William Binzen and F. W. Binzen are the names of the same individual, F. W. Binzen.

August J. Raskopf and A. J. Roskopf are the names of the same individual, A. J. Raskopf.

Herbert Hadley Schwamb, Herbert H. Schwamb and H. H. Schwamb are the names of the same individual, H. H. Schwamb.

Frederick A. Bantz, Fred A. Bantz and F. A. Bantz are the names of the same individual, F. A. Bantz.

Robert Charles Weiderman and R. C. Weiderman are the names of the same individual, R. C. Weiderman.

76.

Plaintiff Harvey L. Wells was born on September 24, 1896.

Plaintiff Harry J. Albertsen was born on April 6, 1896.

77.

No participant under the Plan had any right to continued employment by the Penney Company.

78.

Any participant could be discharged by J. C. Penney Company without cause at any time prior to acquiring retirement status.

* * * * *

80.

Each participant in the Plan, including plaintiffs, whose participation ceased prior to reaching retirement status received from the Trust an amount equal to the aggregate of his own contributions and in addition the other credits from the Fund to which he was entitled under the Plan, either in cash or in annuities surrenderable for cash.

81.

Plaintiffs at all times during their respective periods of participation in the Plan, commencing in 1940, knew that the Plan provided that only participants reaching retirement status as defined in the Plan would be entitled to receive shares of the J. C. Penney Company stock held by the Trustee.

82.

No participant whose participation in the Retirement Plan terminated because of death or any other reason before attaining the compulsory retirement age of 60, as defined in the Plan, has

received any of the shares of J. C. Penney Company stock held by the Trustee in the Plan.

Agreed Propositions of Law

1.

The Penney Company could, while the Plan was in effect, discharge a store manager or any other participant, without cause.

2.

The Plan and Trust Agreement are to be construed in accordance with the laws of the State of New York.

3.

The Penney Company qualified the Plan under Section 165 of the Internal Revenue Code.

Stipulation Re Contentions and Issues

It is agreed by all parties that the classification of the Contentions and Issues which follows hereafter as being Contentions or Issues of Law or Fact is intended for the convenience of the Court and parties, and such classification shall not prejudice any rights of the parties.

Plaintiff's and Defendants' Contentions of Fact and Law, all Answers and Countercontentions thereto, all replies to Countercontentions of Fact or Law, and the Issues of Fact and Law raised in respect to such Contentions and Countercontentions are submitted herewith subject to the right of any party to object at the trial to the relevance or materiality of any or all such Contentions, Answers, Countercontentions, Replies and Issues.

Plaintiffs' Contentions of Fact

1.

Plaintiffs contend that the Plan was an inducement to the managers of its stores and the other members of its management staff to continue in the employment of Penney Company.

2.

Plaintiffs contend that plaintiffs and the other managers and members of the management staff, in reliance upon the Plan and its provisions, continued in the employment of Penney Company.

3.

Plaintiffs contend that the opportunity to receive stock upon retirement was the chief inducement for the managers of stores and members of the management staff to remain in the employment of Penney Company.

4.

Plaintiffs contend that the 200,000 shares of J. C. Penney Company stock were purchased by the Trustee acting for and on behalf of plaintiffs and all other then participants.

5.

Plaintiffs contend that the 200,000 shares of J. C. Penney Company stock acquired by the Trustee were purchased by the Trustee with the funds and upon the financial responsibility of plaintiffs and the other then participants.

6.

Plaintiffs contend that all the funds and moneys

used to pay for the 200,000 shares of J. C. Penney Company stock were the funds and moneys of plaintiffs and the other then participants.

7.

Plaintiffs contend that all the funds borrowed by the Trustee from Continental Bank were borrowed upon the security of assets and funds owned by the plaintiffs and the other then participants.

8.

Plaintiffs contend that all the sums used to repay the loan, and accrued interest thereon, procured by the Trustee from Continental Bank, were the funds and moneys of plaintiffs and the other then participants.

9.

Plaintiffs contend that the death of a participant resulted in the forfeiture of any shares of stock to which such participant would have been entitled upon reaching retirement status, and that the shares so forfeited remained in the Fund for distribution to other participants.

10.

Plaintiffs contend that the discharge of a participant resulted in the forfeiture of any shares of stock to which such participant would have been entitled upon reaching retirement status, and that the shares so forfeited remained in the Fund for distribution to other participants.

11.

Plaintiffs contend that the voluntary withdrawal of a participant for any reason resulted in the for-

feiture of any shares of stock to which such participant would have been entitled upon reaching retirement status, and that the shares so forfeited remained in the Fund for distribution to other participants.

12.

Plaintiffs contend that the shares of stock constitute a prize which was to be awarded to such participants as were fortunate enough to live until attaining retirement status, and to be in good health until attaining retirement status, and to not be discharged prior to attaining retirement status.

13.

Plaintiffs contend that the possibility of death, illness, and discharge were hazards and chances assumed by each participant whose contributions and earnings were used in the acquisition of the shares of J. C. Penney Company stock.

14.

Plaintiffs contend that 4 per cent of the value of the shares of stock of J. C. Penney Company which are found by the Court to have been acquired by the Trustee by the use of the contributions and earnings of the Plaintiffs and those for whom plaintiffs prosecute this action is the reasonable value of the services of plaintiffs' attorneys in instituting and prosecuting this action.

15.

At the time of the inception of the Plan and of

becoming participants in the Plan and Trust, Plaintiffs were not advised of any illegality in any portion of the Trust Agreement, and plaintiffs were not so advised until within the two months immediately prior to the institution of the present suit, which was after the employment of their present counsel and consultation with such counsel.

Defendants' Answers and Countercontentions of
Fact to Plaintiffs' Contentions of Fact

1.

Defendants admit plaintiffs' Contention of Fact No. 1, but defendants contend that the Plan was one among many other factors, including those set forth in the defendants' Answer and Countercontention to plaintiffs' Contention of Fact No. 2 below, which motivated managers of the Penney Company stores and other members of its management staff to continue in its employ.

2.

Defendants deny plaintiffs' Contention of Fact No. 2. Defendants contend that the plaintiffs and other members of the management staff of the Penney Company continued in the employment of the Penney Company for many years when there was no Profit-Sharing Retirement Plan. Defendants contend that in addition to the Plan and its provisions there were many other factors that motivated plaintiffs and other members of the Management Staff in continuing in the employ of the Penney Company. Among these were:

A. Liberal remuneration in the form of salary and profit-sharing compensation.

B. Unusual opportunity for advancement because of the growth of the Company, because of the principle of promotion from within the Company's ranks and because of the absence of family control.

C. Facilities and assistance provided by the Company to assist men in realizing their maximum possibilities.

D. Independence of action extended to managers in operating their stores.

E. Fair and equitable treatment of all associates irrespective of rank.

F. The financial soundness and stability of the Company, and the consequent freedom from financial worry about the business.

G. Benefits provided under the liberal Sick Benefit Plan, and the availability of Group Life and Disability Insurance, Automobile and other types of insurance at low rates.

H. Encouragement of store managers to participate actively in community affairs.

3.

Defendants deny plaintiffs' Contention of Fact No. 3. Defendants contend that all the benefits provided under the Plan, together with other factors including those set forth in defendants' Answer and Countercontention in paragraph 2 above, motivated managers of stores and other members of

the Management Staff in continuing in the employ of the Penney Company.

4.

Defendants deny plaintiffs' Contention of Fact No. 4.

5.

Defendants deny plaintiffs' Contention of Fact No. 5.

6.

Defendants deny plaintiffs' Contention of Fact No. 6.

7.

Defendants deny plaintiffs' Contention of Fact No. 7.

8.

Defendants deny plaintiffs' Contention of Fact No. 8.

9.

Defendants deny plaintiffs' Contention of Fact No. 9.

10.

Defendants deny plaintiffs' Contention of Fact No. 10.

11.

Defendants deny plaintiffs' Contention of Fact No. 11.

12.

Defendants deny plaintiffs' Contention of Fact No. 12.

13.

Defendants deny plaintiffs' Contention of Fact No. 13.

14.

Defendants deny plaintiffs' Contention of Fact No. 14.

15.

Defendants have no knowledge of what advice the plaintiffs received at any time from their present or other counsel or anyone else as to any alleged illegality respecting the Plan and Trust Agreement and for that reason deny plaintiffs' Contention of Fact No. 15.

Plaintiffs' Answers to Defendants' Countercontentions of Fact

1.

Plaintiffs deny defendants' Countercontention of Fact number 1.

2.

Plaintiffs admit that they and other members of the Penney Company continued in the employ of Penney Company for many years when there was no profit-sharing retirement plan, but contend that during the earlier years of such continuance in said employment there was an opportunity to become a partner in one of the Penney stores and that in the later years of such employment there were opportunities from time to time to purchase so-called "expansion stock" sold by the Penney Company. Plaintiffs deny the remainder of defendants' Countercontention of Fact number 2.

3.

Plaintiffs deny defendants' Countercontention of Fact number 3.

Defendants' Contentions of Fact

1.

Defendants contend that the Profit-Sharing Retirement Plan became effective as of January 1, 1940.

2.

Defendants contend that J. C. Penney Company, in making its contributions to the Fund under the Plan and in taking all other action complained of by the plaintiffs with respect to the Plan and Trust Agreement, relied upon the acceptance of the Plan and Trust Agreement by plaintiffs and other participants as evidenced by their execution of Participant's Acceptance Forms.

3.

Defendants contend that at no time prior to the commencement of this action did plaintiffs or either of them assert any claim that the Plan and Trust Agreement in so far as they related to the 200,000 shares of stock were void and invalid in any way.

4.

Defendants contend that with respect to the total amounts shown upon Exhibit 292 as being received by each participant whose participation ceased prior to July 1, 1945, or thereafter but prior to such participant's reaching age 60, as defined in

the Plan, such total amounts, of such participation ceased prior to March 1, 1948, were received by participants, or if not living, by their beneficiaries, in cash, if participation ceased on or after March 1, 1948 then such amounts were in the form of deferred installment refund annuities, surrenderable for cash, purchased under the Group Annuity Contracts, with rights in their beneficiaries if participation ceased because of death to receive such amounts under the Death Benefit provisions of the Group Annuity Contracts.

5.

If the relief sought by plaintiffs should be granted there may be distributed to some or all of the 1215 past participants whose participation in the Plan ceased prior to their reaching retirement status between January 1, 1940 and December 31, 1953, or to their estates, a very substantial number of shares of the Penney Company stock held by the Trustee. The number of shares in the hands of the Trustee which would otherwise be available for distribution to retiring participants would accordingly be reduced and present participants reaching retirement status would receive a smaller number of shares than they would otherwise have received under the formula provided in the Plan. In addition the dividend credits that would otherwise be available to purchase their annuities receivable upon retirement would be reduced as a result of the distribution of such shares of stock from the Trust Fund. Furthermore, the dividend credits that would otherwise form part of

the aggregate credits of present participants who cease participation in the Plan before reaching retirement status would likewise be reduced as a result of the distribution of such shares from the Trust Fund.

Plaintiffs' Answers to Defendants' Contentions of Fact

1.

Plaintiffs deny defendants' Contention of Fact number 1.

2.

Plaintiffs deny defendants' Contention of Fact number 2.

3.

Plaintiffs admit defendants' Contention of Fact number 3, except plaintiffs contend that defendants were advised prior to suit that claims would be asserted on behalf of the plaintiffs and those for whom they prosecute the action.

4.

Plaintiffs do not have information as to the Contention of Fact number 4 of defendants, and therefore deny the same.

5.

Plaintiffs deny defendants' Contention of Fact number 5.

Defendants' Answers to Plaintiffs' Countercontentions of Fact

Defendants deny plaintiffs' Countercontention of Fact set forth in plaintiffs' Answer to defendants' Contention of Fact number 3.

Plaintiffs' Contentions of Law

1.

Plaintiffs contend that plaintiffs and the other store managers and members of the management staff accepted the Plan by continuing in the employment of the Company.

2.

Plaintiffs contend that upon the acceptance of the Plan by continuing in employment the Plan became a contract.

3.

Plaintiffs contend that the employment contracts in force between Penney Company and its store managers when the Plan was issued did not require the store managers to continue in their employment.

4.

Plaintiffs contend that, after the sale of the 200,000 shares of J. C. Penney Company stock to the Trustee, J. C. Penney Company did not own, and did not have any beneficial interest in, such shares of stock.

5.

Plaintiffs contend that the trust purported to be created with respect to the 200,000 shares of stock was in effect a lottery, and against the public policy of the State of New York, and void.

6.

Plaintiffs contend that under the Plan the shares of stock were to be awarded, as a prize, to those of the participants who were so fortunate as to reach

retirement status and in so doing remain alive and avoid discharge without cause, and remain free from illness forcing voluntary retirement.

7.

Plaintiffs contend that the shares of those participants who died prior to reaching retirement status, or who were discharged, or who, on account of illness or other causes, voluntarily retired, remained in the Trust and were, or are to be, distributed to other participants who attained, or will attain, retirement status.

8.

Plaintiffs contend that the Plan and Trust Agreement constitute one instrument and are to be construed as a whole.

9.

Plaintiffs contend that the J. C. Penney Company and the Trustee are the only necessary parties defendant in this action.

10.

Plaintiffs contend that they are entitled to a decree adjudging and decreeing that the trust purported to be established with respect to the shares of stock of J. C. Penney Company is illegal and void and of no effect.

11.

Plaintiffs further contend that a decree should be entered herein adjudging and decreeing that the trustee holds the shares of stock of J. C. Penney Company under a resulting trust in favor of the plaintiffs and those for whom plaintiffs prosecute this action and all other participants who did not

attain retirement status in that proportion which the contributions and earnings of each such person bears to the total contributions and earnings of all such persons used in the acquisition of and payment for said shares of stock.

12.

Plaintiffs contend that they are entitled to a decree determining what proportion of the shares of J. C. Penney Company stock were acquired by the contributions and earnings of the plaintiffs and those for whom the present action is prosecuted by plaintiffs.

13.

Plaintiffs contend that plaintiffs are entitled to a decree awarding plaintiffs compensation for the reasonable value of the services of their attorneys in the prosecution of this action, and for their costs and disbursements incurred herein, and further decreeing that the sums so awarded shall constitute a lien upon all the shares of stock found by the court to have been acquired by the contributions and earnings of the plaintiffs and those for whom they prosecute this action.

Defendants' Answers and Countercontentions of
Law to Plaintiffs' Contentions of Law

1.

Defendants deny plaintiffs' Contention of Law No. 1. Defendants contend that the Plan, when originally distributed to eligible associates, was an offer by Penney Company to such persons, including

plaintiffs, which was accepted by each of them and became a contract when he signed and delivered to Penney Company his Participant's Acceptance Form. Defendants further contend that the Plan, as amended from time to time, has continued since its original distribution to be an offer by Penney Company to associates becoming eligible, such offer being accepted by them upon their signing and delivering to Penney Company their Participant's Acceptance Forms.

2.

Defendants deny plaintiffs' Contention of Law No. 2. Defendants here repeat the countercontentions made by them in their answer to plaintiffs' Contention of Law No. 1.

3.

Defendants admit plaintiffs' Contention of Law No. 3. Defendants, however, by way of supplementing said admission, contend that after the Plan became effective, neither employment contracts nor the Plan itself required or gave a right to managers to continue in their jobs.

4.

Defendants deny plaintiffs' Contention of Law No. 4. Defendants contend that Penney Company did not own and did not have any interest in the shares of stock purchased and held by the Trustee under the Agreement of Trust or in the dividends therefrom except defendants contend that Penney Company did have an interest in having the Plan and the assets of the Fund under the Plan, which

included the 200,000 shares of J. C. Penney Company stock purchased by the Trustee, properly administered.

5.

Defendants deny plaintiffs' Contention of Law No. 5.

6.

Defendants deny plaintiffs' Contention of Law No. 6.

7.

Defendants deny plaintiffs' Contention of Law No. 7.

8.

Defendants deny plaintiffs' Contention of Law No. 8 except defendants admit that the Plan and Trust Agreement shall be read as an entirety.

9.

Defendants deny plaintiffs' Contention of Law No. 9. Defendants contend that the interests of present participants under the Plan are such that said participants are indispensable parties to this action.

10.

Defendants deny plaintiffs' Contention of Law No. 10.

11.

Defendants deny plaintiffs' Contention of Law No. 11.

12.

Defendants deny plaintiffs' Contention of Law No. 12.

13.

Defendants deny plaintiffs' Contention of Law No. 13.

Plaintiffs' Answers to Defendants' Countercontentions of Law

1.

Plaintiffs deny defendants' Countercontention of Law number 1.

2.

Plaintiffs deny defendants' Countercontention of Law number 2.

3.

Plaintiffs admit defendants' Countercontention of Law number 3.

4.

Plaintiffs admit defendants' Countercontention of Law number 4.

5.

Plaintiffs deny defendants' Countercontention of Law number 9.

Defendants' Contentions of Law

1.

Defendants contend that the Plan and Trust Agreement with respect to the 200,000 shares of J. C. Penney Company stock are valid under the laws of the State of New York in all respects.

2.

Defendants contend that all funds received by the Trustee from Company contributions, participants'

contributions, dividends and earnings of the Fund, together with the 200,000 shares of J. C. Penney Company stock, became the property, not of the participants, but of the Trustee, subject only to the terms of the Plan and Trust Agreement.

3.

Defendants contend that all the funds and the 200,000 shares of stock referred to in defendants' Contention of Law No. 2 above were and have been held, applied or distributed in accordance with the terms of the Plan and Trust Agreement.

4.

Defendants contend that the plaintiffs and each of them are estopped to deny the validity of the Plan and Trust Agreement in so far as it applies to the 200,000 shares of J. C. Penney Company stock held by the Trustee for the following reasons:

(a) The plaintiffs signed Participant's Acceptance Forms agreeing to be bound by the terms of the Plan and Trust Agreement.

(b) The plaintiffs during their respective periods of participation in the Plan accepted the benefits provided under the Plan.

(c) From 1940 when the plaintiffs signed their Acceptance Forms until the commencement of this action neither of the plaintiffs made any claim that the Plan or Trust Agreement were invalid in any way.

(d) J. C. Penney Company, in making its contributions to the Plan and in taking all other action complained of by the plaintiffs with respect to the

Plan and Trust Agreement, relied upon the facts set forth in (a), (b) and (c) above.

5.

Defendants contend that plaintiffs Wells and Albertsen with notice of the terms and conditions of the Plan and Trust Agreement from at least the dates on which they signed their respective Participant's Acceptance Forms (being August 10, 1940 for Wells and September 18, 1940 for Albertsen) refrained from making any protests against such terms and conditions in so far as they related to the holding of the 200,000 shares of J. C. Penney Company stock for distribution only to participants reaching retirement status as defined in the Plan, and refrained from commencing this action until July 11, 1951, during all of which periods J. C. Penney Company made the contributions and took the other action called for by the Plan and Trust Agreement, and plaintiffs therefore have been guilty of such laches as should in equity bar them and each of them from maintaining this action.

6.

Defendants contend that plaintiffs Wells and Albertsen do not represent anyone other than themselves in this action.

7.

Defendants contend that this action is not properly maintainable as a class action.

If the Court should disagree with defendants'

Contentions of Law numbers 6 and 7 above, defendants make the Contentions of Law appearing in paragraphs 8 and 9 below.

8.

Defendants contend that all former participants are estopped to deny the validity of the Plan and Trust Agreement in so far as it applies to the 200,000 shares of J. C. Penney Company stock held by the Trustee for the following reasons:

(a) All former participants signed Participant's Acceptance Forms agreeing to be bound by the terms of the Plan and Trust Agreement.

(b) All former participants during their respective periods of participation in the Plan accepted the benefits provided under the Plan.

(c) From the respective dates when all former participants signed their Acceptance Forms until the commencement of this action no former participant made any claim that the Plan or Trust Agreement were invalid in any way.

(d) J. C. Penney Company, in making its contributions to the Plan and in taking all other action complained of in this action with respect to the Plan and Trust Agreement, relied upon the facts set forth in (a), (b) and (c) above.

9.

Defendants contend that all former participants with notice of the terms and conditions of the Plan and Trust Agreement from at least the dates on which they signed their respective Participant's Acceptance Forms refrained from making any protests

against such terms and conditions in so far as they related to the holding of the 200,000 shares of J. C. Penney Company stock for distribution only to participants reaching retirement status as defined in the Plan, and refrained from commencing any action until July 11, 1951, during all of which periods J. C. Penney Company made the contributions and took the other action called for by the Plan and Trust Agreement, and all former participants therefore have been guilty of such laches as should in equity bar them and each of them from maintaining this action.

Plaintiffs' Answers to Defendants' Contentions of Law

Plaintiffs deny each and every of defendants' Contentions of Law.

Key to Letters Used in Issues of Fact and Law:
PCF—Plaintiffs' Contentions of Fact.

DCCF—Defendants' Countercontentions of Fact.

PADCCF—Plaintiffs' Answers to Defendants' Countercontentions of Fact.

DCF—Defendants' Contentions of Fact.

PCL—Plaintiffs' Contentions of Law.

DCCL—Defendants' Countercontentions of Law.

PADCCL—Plaintiffs' Answers to Defendants' Countercontentions of Law.

DCL—Defendants' Contentions of Law.

Issues of Fact

A. Issues of Fact Based Upon Plaintiffs' Contentions of Fact, Defendants' Answers and Countercontentions of Fact Thereto, and Plaintiffs' Answers to Defendants' Countercontentions of Fact

1. (DCCF 1)

Was the Plan one among many other factors which motivated the managers and the other members of the management staff to continue in the employ of the Penney Company?

2. (PCF 2)

Did plaintiffs and the other managers and members of the management staff continue in the employment of the Penney Company in reliance upon the Plan and its provisions?

3. (DCCF 2, 3)

Were there many other factors, including those set forth in Defendants' Answer and Countercontention to Plaintiffs' Contention of Fact No. 2, which, in addition to the Plan and its provisions, motivated plaintiffs and the other members of the management staff in continuing in the employ of the Penney Company?

4. (PADCCF 2)

During the years prior to the Plan when plaintiffs and other members of the management staff continued in the employ of the Penney Company, were there in the earlier years of such period opportunities for them to become partners in Penney stores, and were there in the later years of such

period opportunities for them, from time to time, to purchase "expansion stock" which was sold by the Penney Company?

5. (PCF 3)

Was the opportunity to receive stock upon retirement the chief inducement for the managers and the other members of the management staff to remain in the employment of the Penney Company?

6. (PCF 4)

In purchasing the 200,000 shares of Penney Company stock was the Trustee acting for and on behalf of plaintiffs and all the other then participants?

7. (PCF 5)

Were the 200,000 shares of J. C. Penney Company stock acquired by the Trustee purchased by the Trustee with the funds and upon the financial responsibility of plaintiffs and the other then participants?

8. (PCF 6)

Were all the funds and moneys used to pay for the 200,000 shares of J. C. Penney Company stock the funds and moneys of plaintiffs and the other then participants?

9. (PCF 7)

Were all the funds borrowed by the Trustee from Continental Bank borrowed upon the security of assets and funds owned by plaintiffs and the other then participants?

10. (PCF 8)

Were all the sums used to repay the loan from Continental Bank, and the accrued interest thereon, the funds and moneys of plaintiffs and the other then participants?

11. (PCF 9)

(a) Did the death of a participant result in the forfeiture of the shares of stock to which such participant would have been entitled upon reaching retirement status?

(b) If the answer to (a) above is in the affirmative did the shares so forfeited remain in the Trust for distribution to other participants?

12. (PCF 10)

(a) Did the discharge of a participant result in the forfeiture of the shares of stock to which such participant would have been entitled upon reaching retirement status?

(b) If the answer to (a) above is in the affirmative, did the shares so forfeited remain in the Trust for distribution to other participants?

13. (PCF 11)

(a) Did the voluntary withdrawal of a participant for any reason result in the forfeiture of the shares of stock to which such participant would have been entitled upon reaching retirement status?

(b) If the answer to (a) above is in the affirmative, did the shares so forfeited remain in the Trust for distribution to other participants?

14. (PCF 13)

Were death, illness and discharge from the employment of the Penney Company hazards and chances which were assumed by each participant whose contributions and earnings, plaintiffs contend, were used in the acquisition of the shares of J. C. Penney Company stock?

15. (PCF 14)

If the Court should enter a decree awarding plaintiffs and others whom they contend they represent shares of stock of J. C. Penney Company, would 4% of the value of such shares be a reasonable amount to be allowed, if any allowance be made, for the services of plaintiffs' attorneys in this action?

B. Issues of Fact Based Upon Defendants' Contentions of Fact, and Plaintiffs' Answers and Countercontentions Thereto, and Defendants' Answers Thereto.

16. (DCF 1)

Did the Profit-Sharing Retirement Plan become effective as of January 1, 1940?

17. (DCF 4)

Did J. C. Penney Company, in making its contributions to the Fund under the Plan and in taking all other action with respect to the Plan and Trust Agreement, rely upon the acceptance of the Plan and Trust Agreement by plaintiffs and other participants as evidenced by their execution of Participant's Acceptance Forms?

18. (PADCF 5)

Were defendants prior to suit advised that claims would be asserted on behalf of the plaintiffs and others for whom they contend they prosecute this action?

19. (DCF 6)

Were the total amounts shown upon Ex. 292 as being received by each participant, or his beneficiary in case of death, received in cash if participation ceased prior to March 1, 1948, and, if participation ceased after such date, were the amounts in the form of deferred installment refund annuities, surrenderable for cash, purchased under the Group Annuity Contracts, with rights in beneficiaries if participation ceased because of death to receive such amounts under the Death Benefit provisions of the Group Annuity Contracts.

20. (PCF 15)

Were the plaintiffs at the inception of the Plan and at the time of becoming participants in the Plan and Trust and prior to two months immediately prior to the institution of the present suit advised of any illegality in any portion of the Trust Agreement?

Issues of Law

A. Issues of Law Based Upon Plaintiffs' Contentions of Law, Defendants' Answers and Countercontentions of Law Thereto, and Plaintiffs' Answers to Defendants' Countercontentions of Law

1. (PCL 1)

Did plaintiffs and the other store managers and members of the management staff accept the Plan by continuing in the employ of the Company?

2. (PCL 2)

Did the Plan become a contract upon being accepted by the participants continuing in the Company's employ?

3. (DCCL 1 & 2)

Was the Plan, when originally distributed to eligible associates, an offer by Penney Company to such persons, including plaintiffs, which was accepted by each of them and became a contract when each signed and delivered to Penney Company his Participant's Acceptance Form?

4. (DCCL 1 & 2)

Did the Plan, as amended from time to time, continue to be an offer by Penney Company to associates becoming eligible, which was accepted upon the signing and delivery to Penney Company of their Participant's Acceptance Forms?

5. (PCL 5)

Did Penney Company, after the sale of the 200,000 shares of J. C. Penney Company stock to the Trustee, own, or have any beneficial interest in, such shares of stock?

6. (PCL 6)

Was the trust purported to be created with respect to the 200,000 shares of stock a lottery, and

against the public policy of the State of New York, and void?

7. (PCL 8)

Under the Plan were the shares of stock to be awarded, as a prize, to those participants who were so fortunate as to reach retirement status and, in so doing, remain alive, avoid discharge without cause, and remain free from illness forcing voluntary withdrawal from the Plan?

Defendants do not agree with the foregoing statement of Issue of Law number 7. (PCL 8) and submit in lieu thereof the following Issue:

7A (PCL 8)

Under the Plan were shares of stock to be awarded as a prize to those participants who reached retirement status while still in the employ of the Company?

8. (PCL 9)

Under the Plan were the shares of those participants who died prior to reaching retirement status, or who were discharged prior to reaching retirement status, or who, on account of illness or other causes, voluntarily withdrew as participants prior to reaching retirement status, retained in the Trust and held for distribution to other participants upon their attaining retirement status?

Defendants do not agree with the foregoing statement of Issue of Law number 8. (PCL 9) and submit in lieu thereof the following Issue:

8A (PCL 9)

Did participants who died prior to reaching retirement status, or who were discharged, or who on account of illness or other causes voluntarily left the Company's employ before reaching retirement status, have shares of stock which remained in the trust and were or are to be distributed to other participants who attained or will attain retirement status?

9. (PCL 10)

Do the Plan and Trust Agreement constitute one instrument?

10. (PCL 10)

Are the Plan and Trust Agreement to be construed as a whole?

11. (PCL 12)

Are the J. C. Penney Company and the Trustee the only necessary parties defendant in this action?

12. (DCCL 12)

Are the interests of present participants under the Plan such that said participants are indispensable parties to this action?

13. (PCL 13)

Are plaintiffs entitled to a decree adjudging and decreeing that the trust purported to be established with respect to the shares of stock of J. C. Penney Company is illegal and void and of no effect?

14. (PCL 14)

Should a decree be entered adjudging and decreeing that the Trustee holds the shares of stock of J. C. Penney Company under a resulting trust in favor of plaintiffs and those for whom plaintiffs prosecute this action and all other participants who did not attain retirement status in that proportion which the contributions and earnings of each such person bears to the total contributions and earnings of all such persons used in the acquisition and payment for said shares of stock?

15. (PCL 15)

Are plaintiffs entitled to a decree determining what proportion of the shares of J. C. Penney Company stock was acquired by the contributions and earnings of plaintiffs and those for whom plaintiffs prosecute this action?

16. (PCL 16)

Are plaintiffs entitled to a decree awarding plaintiffs compensation for the reasonable value of the services of their attorneys in the prosecution of this action, and for their costs and disbursements incurred herein, and decreeing that the sums so awarded shall constitute a lien upon the shares of stock found by the court to have been acquired by the contributions and earnings of the plaintiffs and those for whom they prosecute this action?

B. Issues of Law Based Upon Defendants' Contentions of Law and Plaintiffs' Answers Thereto

17. (DCL 1)

Are the Plan and Trust Agreement with respect to the 200,000 shares of J. C. Penney Company stock valid in all respects under the laws of the State of New York?

18. (DCL 2)

Did all the funds received by the Trustee from Company contributions, participants' contributions, dividends and earnings of the Fund, together with the 200,000 shares of J. C. Penney Company stock, become the property not of the participants but of the Trustee, subject only to the terms of the Plan and Trust Agreement?

19. (DCL 3)

Are, and were, all the funds and the 200,000 shares of stock referred to in Issue of Law number 18. above held, applied or distributed in accordance with the terms of the Plan and Trust Agreement?

20. (DCL 4)

Are the plaintiffs, and each of them, estopped to deny the validity of the Plan and Trust Agreement in so far as it applies to the 200,000 shares of J. C. Penney Company stock held by the Trustee

(a) Because plaintiffs signed Participant's Acceptance Forms agreeing to be bound by the terms of the Plan and Trust Agreement?

(b) Because plaintiffs during their respective periods of participation accepted benefits provided under the Plan?

(c) Because, from 1940 when plaintiffs signed their Acceptance Forms until commencement of this action, plaintiffs did not make any claim that the Plan or Trust Agreement was invalid in any way?

(d) Because J. C. Penney Company, in making its contributions to the Plan and in taking all other action with respect to the Plan and Trust Agreement, relied upon facts set forth in (a), (b) and (c) above?

21. (DCL 5)

Are the plaintiffs guilty of such laches as should in equity bar them and each of them from maintaining this action because plaintiffs with notice of the terms and conditions of the Plan and Trust Agreement from at least the dates they signed their respective Participant's Acceptance Forms refrained from making any such protests against such terms and conditions in so far as they related to the holding of the 200,000 shares of J. C. Penney Company stock for distribution only to participants reaching retirement status as defined in the Plan and plaintiffs refrained from commencing this action until July 11, 1951, during all of which periods the Penney Company made the contributions and took the other action called for by the Plan and Trust Agreement.

22. (DCL 6)

Do plaintiffs Wells and Albertsen represent anyone other than themselves in this action?

23. (DCL 7)

Is this action properly maintainable as a class action?

If the Court should decide Issues of Law 22. and 23. above in the affirmative then the Court should consider and determine Issues of Law 24. and 25. below.

24. (DCL 8)

Are all former participants estopped to deny the validity of the Plan and Trust Agreement in so far as it applies to the 200,000 shares of stock of J. C. Penney Company held by the Trustee for the reasons set forth in (a), (b), (c) and (d) of number 20. above?

25. (DCL 9)

Are all former participants guilty of laches for the reasons set forth in Issue of Law number 21. above?

* * * * *

The parties hereto agree to the foregoing Pre-trial Order and the Court being fully advised in the premises,

Now Orders that this case shall proceed to trial before the Court without a jury; it is further

Ordered that the foregoing Pre-trial Order shall not be amended, except by consent of all parties or to prevent manifest injustice; it is further

Ordered that this Pre-trial Order supersedes all pleadings; it is further

Ordered that upon trial of this cause, no proof shall be required as to matters of fact hereinabove found to be admitted, but that proof upon the Issues

of Fact between plaintiffs and defendants as herein-above stated shall be had.

Dated at Portland, Oregon, this 22nd day of June, 1954.

/s/ GUS J. SOLOMON,
District Judge

Approved:

/s/ RALPH H. KING,
Of Attorneys for Plaintiffs

/s/ CLARENCE J. YOUNG,
Of Attorneys for Defendants

[Endorsed]: Filed June 22, 1954.

[Title of District Court and Cause.]

OPINION

December 29, 1955

Solomon, Judge:

The stock distribution provisions of the Penney Company Retirement Plan are valid and legal. They do not involve a lottery or other illegal scheme.

The stock provisions are an integral part of the Plan, but whether such provisions are considered separately or in connection with other portions of the Plan does not alter my opinion that the distribution of stock to only those persons who reach retirement age and otherwise qualify under the Plan, is a valid and legal arrangement.

The Plan and the amendments made thereto were

submitted to the Commissioner of Internal Revenue, and by him found to qualify as an employees' trust under §§165 and 165(a) of the Internal Revenue Code. By reason thereof, contributions made by the company are deductible in computing its income subject to federal income tax, and the income from the trust is exempt from such taxes. In my opinion, the contention that the stock provisions of the Plan conflict with federal tax law is without merit.

The prohibition against lotteries, bookmaking, and gambling in the New York Constitution and the New York Statutes defining a lottery were never designed to nor do they cover a situation of this kind in which stock is distributed to employees who qualify under retirement or pension plans.

This particular Plan is both generous and sound. The fact that older employees, among them some members of the company's Board of Directors, who were among the first to qualify for retirement with stock, received a slightly greater number of shares than younger and future employees will receive when they retire, does not render the Plan unfair, discriminatory, fraudulent or illegal. Neither is it a proper basis for attacking the integrity of the executive officers and members of the Board of the company who were responsible for the Plan. There is a sound and rational basis for permitting employees who have not built up large credits for themselves under other provisions of the Plan to receive an advantage in connection with the distribution of stock.

In 1940, the company sold 200,000 shares of its un-

issued stock to the trust set up in connection with the Plan for \$5,700,000 (later adjusted to \$6,000,000). This was approximately \$10,000,000 less than its market value. Since that time, the company has contributed, on an annual basis, an amount equal to 2% of the prior year's aggregate regular salaries of all participants, in accordance with §6(a) of the Plan, and 6% of the company's net profit in excess of 15% of the common stock book value of the company, in accordance with §6(b) of the Plan.

On December 31, 1953, the remaining Penney stock held by the trustee had a market value of over \$36,000,000. The other assets held in connection with the Plan exceeded \$63,000,000. The total direct contributions to such assets by the participants amounted to less than \$36,000,000.

In one sense, all of the company's contributions can be characterized as being part of the compensation paid to participants. But that does not mean that the participants were entitled to receive such contributions or the benefits thereof in a manner other than that specified in the Plan itself. Nor does it mean that the loan with which the stock was purchased was repaid solely from funds contributed by the participants.

All of the participants signed acceptance forms, agreeing to be bound by the terms of the Plan and Trust Agreement. Plaintiffs, as well as all former participants in the Plan who did not achieve retirement status, have accepted benefits which have included large contributions by the company. The company made its original contribution and its subse-

quent contributions on the basis of such acceptances and the validity of the Plan.

I have already found that the Plan is valid, but even if by some technical construction the Plan was found to constitute a lottery, it would be highly inequitable to permit plaintiffs to recover either on their own behalf or on behalf of the class for which they are suing.

This opinion assumes and I find that this action is properly maintainable as a class action in this court.

Counsel for defendants shall prepare findings of fact, conclusions of law, and a judgment in favor of the defendants, all in accordance with this opinion.

[Endorsed]: Filed Dec. 29, 1955.

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION

This cause came on for hearing on February 27th, 1956, on motion of The Chase Manhattan Bank, a New York corporation, successor by merger to The Chase National Bank of the City of New York, for an order substituting it in place of The Chase National Bank of the City of New York as a defendant, and, thereupon, upon consideration thereof, it is

Ordered that The Chase Manhattan Bank be and it hereby is substituted as a party defendant herein in place of The Chase National Bank of the City of New York, that the title of the action be amended accordingly, and that the action be continued with-

out prejudice to any proceedings already had herein.

Dated at Portland, Oregon, this 27th day of February, 1956.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed March 8, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following approval and entry of record of the Pre-Trial Order herein, the above entitled cause came on regularly for trial on the 23rd day of June, 1954, before the Honorable Gus J. Solomon, undersigned Judge of the above entitled Court, sitting without a jury. Plaintiffs appeared in person, and by and through Ralph H. King, Frederick Yerke, Jr., and Paul R. Meyer (King, Miller, Anderson, Nash & Yerke), of their attorneys. Defendant, J. C. Penney Company, a corporation appeared by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, McColloch & Dezendorf), W. H. Dannat Pell, Henry Stone and C. Robert Roll (Pell, Butler, Curtis & LeViness), of its attorneys. Defendant, The Chase National Bank of the City of New York, a national banking association, a predecessor in interest to defendant The Chase Manhattan Bank, a corporation, appeared by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, Mc-

Colloch & Dezendorf), of attorneys for said defendant, who now appear for The Chase Manhattan Bank.

Thereupon evidence on their case in chief was introduced on behalf of plaintiffs followed by the introduction of answering evidence on behalf of defendants. All of the parties having rested, the attorneys for the respective parties were directed to prepare and submit briefs to the Court.

Thereafter the case was taken under advisement and the Court, having heard the evidence at the time of trial and having read the Pre-trial Order, which superseded all pleadings, and all of the testimony, exhibits and briefs, and being fully advised, did, on the 29th day of December, 1955, render and file with the Clerk of this Court its opinion in favor of defendants. Subsequent to December 29, 1955 the Court entered an order herein substituting The Chase Manhattan Bank as a defendant in place of The Chase National Bank of the City of New York.

The Court now makes and enters the following:

Findings of Fact

1.

Plaintiff, Harvey L. Wells is, and at the time of instituting this action was, a citizen of the United States and a citizen and resident of the State of Oregon.

2.

Plaintiff, Harry J. Albertsen is, and at the time of instituting this action was, a citizen of the United

States and a citizen and resident of the State of California.

3.

Defendant, J. C. Penney Company (sometimes hereinafter referred to as "Penney Company or the Company") is, and at all times since 1924 has been, a corporation organized and existing under the laws of the State of Delaware.

4.

At the commencement of the action The Chase National Bank of the City of New York (hereinafter referred to as "The Chase Bank"), a national banking association organized and existing under the laws of the United States of America, was named as a defendant. As of April 1, 1955, it was merged into President and Directors of the Manhattan Company (Bank of the Manhattan Company), a corporation organized and existing under the laws of the State of New York, the name of which was changed to The Chase Manhattan Bank. Its principal place of business has at all times been in the City and State of New York.

5.

The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

6.

The business of the Penney Company consists and has consisted of the distribution at retail of wearing apparel for men, women and children, and of dry goods and home furnishings at low and medium prices through a chain of stores situated throughout

the United States. At the end of 1948, the last year plaintiff Wells was employed by the Penney Company, it had 1,601 stores located in small, medium and large size communities in the 48 states, each store being managed by one associate. At the end of 1950 the last full calendar year plaintiff Albertsen was employed by the Penney Company, it had 1,612 stores. At the end of 1953 the Penney Company had a total of 1,634 stores located in the 48 states, of which 42 stores were located in the State of Oregon.

7.

During the years 1937, 1938 and 1939 officials of the Penney Company made a study of retirement plans of various enterprises throughout the United States with the objective of developing a retirement plan which might be suitable to meet the needs of the Penney Company. Following such study and discussions in connection therewith the Comptroller of the Penney Company on or about November 24, 1939 submitted to the members of the Board of Directors of the Company a communication and attachments with reference to the establishment of a profit-sharing retirement plan for store managers and central and branch office executives of the Company. Said documents included a survey of such proposed plan, the plan in detail, explanatory material and exhibits.

8.

At a meeting held on December 5 and 6, 1939 the Board of Directors of the Penney Company, after consideration, adopted by unanimous vote of the full

Board, subject to approval by the stockholders and to its completion in final form, the Profit-Sharing Retirement Plan (for Management Staff) which, as amended from time to time, is before the Court in this action and is hereinafter referred to as the "Retirement Plan" or "the Plan."

9.

The term "compensation" as used in the Plan and as used herein means either the amount received by an employee of the Penney Company under contract as a portion of the profits of the store managed by him, or the amount received by a central or branch office employee as his share of the General Office Compensation Fund which is based on Company profits, and excludes regular salary.

10.

The term "participant" as used in the Plan and as used herein means a store manager or central or branch office employee having a contract entitling him to receive compensation, as defined in Finding of Fact 9 above, including store managers, buyers, employees holding positions of responsibility in the central and branch offices of Penney Company and executives, including those who are directors but excluding those who serve as directors only. It also includes employees holding positions of responsibility in any wholly-owned subsidiary determined by the Administrative Committee to be eligible. The Plan requires participation by all eligible employees.

11.

On December 26, 1939 the Company caused to be mailed to store managers, including plaintiffs, and central and branch office executives a letter of E. C. Sams, then President of the Company, as follows:

“President’s Office

New York, N. Y.

December 26, 1939.

“To the Managers and Central Office Executives:

“As you all know, it has been the unwritten policy of our company occasionally, when circumstances seemed to warrant it, to issue shares of its common stock to eligible executives and store managers. The number of shares, the price, and the time of issuance, depended in a general way on the development of the company. The purpose of that policy was to create incentive through ownership participation in the profits of the company and, also, to assist participants in building for themselves and their families a security against advanced age and often its incidental dependency. It is questioned by the company’s Board whether that policy in recent years has met the purposes intended.

“The Board feels strongly however, that the advisability of attaining the purposes mentioned still exists. It recognizes that ownership participation has played a part in the development of our company. It also believes that distinct benefit will be gained to associates and to the company by assisting associates in building a security against old age de-

pendence. This is being widely recognized in all competitive fields because of the growing need for making room on management staffs for younger associates who may contribute quicker recognition and faster development of new and modern merchandising techniques.

“Accordingly, a profit-sharing and retirement plan has been devised after much thought and study, which it is believed in large measure will in time meet the situation. This plan has been considered and approved by the Board of Directors. The adoption of the plan, however, is strictly subject to the stockholders’ approval, which cannot be obtained before the next annual meeting, March 21, 1940.

“If the plan is adopted, it will become operative as at January 1, 1940. The plan provides, among other things, for withholding a 20% portion of compensation due to all managers and central and branch office executives in any year. This will become part of the manager’s and executive’s savings under the plan. The company will also make certain contributions to the fund set up under the terms of the plan. While the plan does not require withholding of compensation until earnings for 1940 are due, which would ordinarily be paid early in 1941, it will permit deposits up to one-third of 1939, compensation payable early in 1940. In those cases where one-third of compensation is less than \$500.00, deposit privilege will be extended permitting deposit from compensation to \$500.00. In other words, managers may voluntarily deposit from their 1939 compensa-

tion, but there will be no compulsion as to any deposit until the 1940 compensation is paid, early in 1941.

“The plan, if adopted, will not cover any associates other than store managers with contracts and general office associates included in the General Office Compensation Fund. Therefore, men approved as ‘ready-to-manage’, and participants in ‘large’ store pools, will not be included under this Plan.

“This makes it necessary to revise all managers’ contracts as of December 31, 1939. You will be advised about your 1940 contract just as soon as possible after the stockholders’ decision is known. This brief information about the new plan, coming to you now, will permit you to arrange your personal affairs, taking into consideration the possible adoption of the plan and subsequent reduction in your immediate cash income from compensation. Furthermore, we feel sure that when you finally have an opportunity to go over the details of the plan you will recognize that its liberality will make it highly profitable for you to voluntarily deposit a portion of your compensation for 1939.

“Full information regarding the details of the plan will be made available to you when all legal points as to its adoption can be worked out.

“I am indeed happy to be able to advise you of this step. For years we have been seeking a better and more constructive way by which the managers and executives of today and tomorrow might share in the development of this company. Now, after a

year of intensive study, a plan has been developed that appears not only sound from the viewpoint of the stockholder but exceedingly attractive to every man in the management group. I am so enthusiastic about the new plan that it seems to me 1939 will take its place as one of the greatest years in our company's history. In my judgment, through the adoption of the 'Thrift' plan for associates outside the management group, and through the development of this plan for managers and executives, we have added new strength to the Penney Company and paved the way for even greater progress in the years ahead.

Sincerely,
E. C. Sams"

12.

On or about February 29, 1940, there was mailed to each stockholder of the Penney Company, including the plaintiffs, a document consisting of a letter of E. C. Sams, then President of the Company, a notice of the annual meeting of stockholders to be held on March 21, 1940 and a proxy statement containing a summary of the Retirement Plan. The purpose of the meeting was to elect directors and to consider and vote upon the approval and adoption of the Retirement Plan. In his letter Mr. Sams strongly recommended adoption of the Plan, and stated that five directors, including J. C. Penney and himself, would not be participants, but as stockholders were vitally interested in the success of the Company and enthusiastically in favor of the Plan.

13.

At the annual meeting of the stockholders held on March 21, 1940, the stockholders adopted a resolution approving and adopting the Plan effective as of January 1, 1940. Out of a total of 2,543,984 outstanding shares of Penney Company stock listed on the New York Stock Exchange, 1,660,558 shares were represented at the meeting and 1,598,246 shares were voted for the resolution, 60,561 shares being voted against. The Plan has been continuously in effect since its adoption. Shares of stock owned by plaintiff Wells were by his authority voted for such approval and adoption; shares owned by plaintiff Albertsen were not voted.

14.

In the proxy statement for the annual meeting of the stockholders on March 21, 1940, it was stated that upon their approval and adoption of the proposed Plan it was the intention of the Board of Directors to adopt for the salaried employees of the Company the retirement policy set forth in the proxy statement and such retirement policy was adopted by the Board of Directors by resolution on April 23, 1940, and was included as part of the Plan. The policy as so adopted fixed 60 years as the age for compulsory retirement, commencing January 1, 1945, with the first such retirement to take place on July 1, 1945 for those who in that year were 60 years of age or over, and with subsequent retirements to take place on July 1 of each succeeding year.

15.

In the form in which the Plan was adopted by the stockholders a participant was permitted to contribute up to $33\frac{1}{3}\%$ of his compensation for 1939 and was required to contribute 20% of his compensation for each year beginning with 1940 and was permitted to contribute up to $33\frac{1}{3}\%$. On May 28, 1940, the Board of Directors adopted a resolution amending the Plan so that the required contribution for each year beginning with 1940 was $33\frac{1}{3}\%$ of compensation.

16.

On July 8, 1940 the Board of Directors adopted a resolution approving the Plan in final form and approving and authorizing the execution of the Agreement of Trust to be entered into with the Chase Bank as Trustee of the Plan. The Trust Agreement was entered into between the Penney Company and Chase Bank as Trustee on the same day. At all times herein concerned, the trust property which is the subject of this action and the place of administration of the Trust and of the Plan have been and are now located in the City, County and State of New York.

17.

On August 1, 1940 in accordance with the provisions of the Plan and Trust Agreement Penney Company sold to the Chase Bank as Trustee of the Retirement Plan 200,000 shares of its authorized and unissued stock for \$5,700,000, later adjusted to \$6,000,000, the price per share being \$30, which was the approximate per share book value of the Com-

pany's outstanding stock on January 1, 1940. Such shares were to be and were held by the Trustee under the terms of the Plan.

18.

The Plan and Trust Agreement authorized the Trustee to borrow \$5,700,000 from the Continental Illinois National Bank & Trust Company of Chicago (hereinafter referred to as the Continental Bank) to provide funds with which to pay Penney Company for the 200,000 shares of stock and to pledge as security for the loan all the shares of stock, together with all other assets of the Fund. The Plan and Trust Agreement provided that all dividends on such shares of stock and all contributions received from the Company or from participants except a sum not to exceed \$150,000, should be paid to Continental Bank as received on account of the principal and interest of the loan.

19.

Pursuant to the Plan and Trust Agreement a Loan Agreement was entered into between Continental Bank, the Trustee, and the Company on July 25, 1940 providing that the Continental Bank would loan to the Trustee \$5,700,000. The loan was actually made on August 1, 1940, the Trustee delivering to Continental Bank the Trustee's note payable on or before three years from its date with interest at $11\frac{1}{2}\%$ per annum. The note provided in part as follows:

"To secure the payment of this note and of any

and all other liabilities of the undersigned to the holder hereof, howsoever created, arising or evidenced or acquired by said holder, whether direct or contingent, whether now or hereafter existing and whether accrued or to become accrued, the undersigned has pledged, transferred, and delivered to said Bank the following property, viz.:

200,000 shares of Common Stock of J. C. Penney Company, a Delaware corporation,

and, as additional security for the payment of this note and said other liabilities, the undersigned hereby pledges, assigns and transfers to the holder hereof all moneys, which are heretofore or hereafter received by the undersigned and which are, by the terms of said Agreement of Trust, provided generally or specifically to be paid to the Bank or the holder hereof, or to be applied on any indebtedness of the Trustee thereunder to the Bank or the holder hereof, and all such moneys paid to the holder by the undersigned shall be applied first to the payment of any matured and unpaid interest hereon and any balance shall be applied against the principal of this note whether or not then due."

20.

Under the terms of the Loan Agreement, the Penney Company agreed to continue to make the 2% of salary contribution and the 6% of the excess profits contribution required to be made by it under Article 6(a) and 6(b) of the Plan, and not to reduce the amount of these contributions, so long as any part

of the note delivered by the Trustee to the Continental Bank remained unpaid.

21.

The Plan, the Trust Agreement, the Loan Agreement and Note contained provisions to insure that the use by the Trustee of the moneys received by it to repay the loan would not interfere (and in fact it did not interfere) with the Trustee's ability to make whatever payments might be required in accordance with the credits to the various accounts under the Plan to participants who might leave the employ of the Company in the early years of the Plan. Those provisions were as follows:

(1) The Trustee was authorized by the Trust Agreement, Article Fourth E, and the Note that it delivered to the Continental Bank to retain, out of the cash received by it, \$150,000 for working funds.

(2) The Loan Agreement, paragraph 2, provided that the Bank at any time after the principal of the loan had been reduced to \$4,500,000 or less would make a new loan to the Trustee up to \$500,000 and would also release to the Trustee up to 10,000 shares of Penney Company stock.

(3) Under the terms of the Plan, Article 5, and Trust Agreement, Article Fourth B, Eighth A, the Trustee was authorized to reborrow from the Continental Bank, after any partial repayment of the original loan, up to \$5,700,000 (including any unpaid balance of the original loan) and, after complete repayment of any loans from the Continental Bank, to borrow without restriction on the security of the as-

sets in the Fund such amounts as might be required to carry out the purposes of the trust.

The Trustee paid the loan down to \$4,200,000 on the day that the loan was made. It did not at any time become necessary for the Trustee to borrow additional funds from the Continental Bank or from any other source. Both prior and subsequent to the repayment of the loan, the provisions set forth above constituted a resource of the Fund available to the Trustee to obtain additional moneys if any had been necessary to pay the credits of participants withdrawing from the Plan.

22.

Based on the price of Penney Company stock on the New York Stock Exchange on August 1, 1940, the 200,000 shares of Penney Company stock sold by the Penney Company to the Trustee had a value of \$16,000,000; between that date and December 29, 1941, the date when the loan was fully repaid, the value ranged between \$14,600,000 and \$18,400,000; between August 1, 1940, and December 31, 1953, the value of the shares held in the Trust was never lower than \$11,400,000. On December 31, 1953, the remaining Penney Company stock held by the Trustee had a market value of over \$36,000,000.

23.

The Trustee repaid the loan from the Continental Bank in full by December 29, 1941, interest having amounted to \$38,980.21. To do so, it used, in accordance with the provisions of the Plan and Trust Agreement, moneys received from contributions by

participants as well as the moneys from the Company's contributions measured by salary and profits and the dividends received on the Penney Company stock held by the Trustee.

24.

The use of the Fund's assets to pay the loan, including interest and expenses, did not interfere with making credits to the accounts provided for by the Plan in accordance with the terms thereof. At all times from August 1, 1940, through December 31, 1953, the resources of the Trust were sufficient to satisfy the credits of all participants.

25.

All monies used to pay the loan with which the stock was purchased came into the hands of the Trustee to be used solely in accordance with the Plan and Trust Agreement and retained no separate identity except as assets of the Fund.

26.

On July 25, 1940, the Comptroller of the Penney Company mailed to each store manager, including plaintiffs, and to eligible central and branch office executives a letter enclosing therewith a booklet which included a copy of the Plan and Trust Agreement, together with a Participant's Acceptance Form. Recipients of the letter were therein advised that they were expected to understand the Plan thoroughly and were urged to study the booklet carefully. They were also advised that if any phases of

the Plan were not clear after study, they should present questions to the writer of the letter.

27.

Plaintiff Wells and Plaintiff Albertsen, as store managers, each received one of the letters referred to in Finding of Fact 26 above, together with the booklet and the Participant's Acceptance Form. Each of the plaintiffs signed and returned to Penney Company his executed Acceptance Form. All eligible members of the Management Staff of Penney Company who thereafter became participants in the Plan also executed and returned to the Penney Company such Participant's Acceptance Form. Each participant who executed the Acceptance Form stated therein that he had read and understood the terms of the Plan and the Trust Agreement, was satisfied with their terms and conditions, and agreed to be bound by them. Plaintiff Wells' participation in the Plan continued from its inception until his resignation from the Penney Company on August 31, 1948. Plaintiff Albertsen's participation in the Plan continued from its inception until his discharge from the Penney Company on December 31, 1950.

28.

The Plan was intended to be and is a continuing Plan. The original Plan participants did not constitute a fixed class but Plan participants constitute an open-end class into which new participants enter to take the place of participants who retire or who leave the employ of the Company before attaining

retirement status. New participants also enter the Plan as the operations of the Penney Company expand and the number of stores increases. There is a constant flow of participants into and out of the Plan. In 1940 when the Plan was established there were 1,716 participants. At the end of the year 1953, there were 1,955 participants. The number of new participants entering the Plan from 1940 to 1953 was 1,454 as against 1,215 leaving the Company on retirement or earlier separation. Of the 1215 leaving the Company on retirement or earlier separation, 272 retired with stock, 102 died prior to reaching retirement status and without receiving stock, and 841 left the Plan for other reasons without receiving stock.

29.

On or about November 12, 1940 the United States Treasury Department issued a ruling that the Retirement Plan met the requirements of Section 165 of the Internal Revenue Code and therefore qualified as an employees' trust entitled to exemption from Federal income taxes. Subsequent to the amendment of Section 165 by the Revenue Act of 1942, the Treasury Department on or about December 21, 1944, issued a ruling that the Plan met the requirement of Section 165(a) of the Internal Revenue Code as amended and therefore qualified as an employees' trust entitled to exemption from Federal income taxes. The Treasury Department has also determined that amendments to the Plan submitted to it from time to time do not affect the Plan's continued qualification as an employees' trust entitled to

exemption from Federal income taxes under the applicable provisions of Section 165 of the Internal Revenue Code, and the Plan has so qualified at all times since its adoption.

30.

Pursuant to the provisions of the Retirement Plan the following action was taken for the years 1940 through 1953 inclusive:

A. From their profit-sharing compensation earned in 1939 and paid in 1940, 1,130 participants made voluntary contributions (being up to $33\frac{1}{3}\%$ of the 1939 compensation of each) in the total amount of \$1,666,827.89, of which amount \$1,575,000 was paid to the Trustee on August 1, 1940, and the remainder of \$91,827.89 was paid to the Trustee on September 26, 1940.

B. Each participant out of profit-sharing compensation earned in the years 1940 and 1941 contributed to the Fund under the Plan $33\frac{1}{3}\%$ of such annual compensation. Pursuant to the action taken by the Board of Directors in amending this Article because of increased **Federal Personal Income Taxes**, the percentage of each participant's contribution for subsequent years was reduced to 20% of his annual profit-sharing compensation.

C. After the close of the calendar year 1940 and of each calendar year thereafter, the Penney Company contributed annually to the Fund under the Plan:

1. An amount equal to 2% of the prior year's

aggregate regular salary paid to all employees receiving compensation as defined in the Plan for all or any part of the respective year, pursuant to Article 6(a) of the Plan.

2. For each of the years 1940 through 1949, an amount equal to 6% of its consolidated net profits for the calendar year in excess of 15% of its common stock book value as at the beginning of such calendar year, pursuant to Article 6(b) of the Plan. However, pursuant to the action of the Board of Directors taken because of the increased Federal taxes applicable to corporate profits for the years 1940 through 1945, in computing the contribution for these years called for by Article 6(b) there was charged against the consolidated net profits of the Company a lower amount for Federal taxes than the amount actually payable. For the years 1946 to 1949, pursuant to an amendment adopted by the Board of Directors restoring subdivision (b) of Article 6 to its original form effective January 1, 1946, the Company's 6% contribution was computed and made as originally provided in Article 6(b).

3. For each of the years 1950 through 1953, pursuant to an amendment to the Plan approved by the stockholders at a special Stockholders' Meeting held on December 27, 1950, an amount equal to 2% of the profits of the Company and its wholly owned subsidiaries for such calendar year available to its common stock as shown by the books of the Company before deduction of provision for Federal taxes based on the profits of the Company and its subsidiaries, and

the amounts required to be contributed by the Company for such year under the terms of its Thrift and Profit-Sharing Retirement Fund Plan and under the terms of this Plan.

31.

A. The annual contributions of each participant were credited to his separate account upon records maintained by the Administrative Committee of the Plan.

B. The Company's annual contributions measured by profits under Article 6(b) of the Plan were placed in an excess profits account for credit to accounts of participants upon their retirement or other separation from the Company.

C. The 200,000 shares of Penney Company common stock were separated in the Fund's account into two blocks, one of 50,000 shares and one of 150,000 shares, with actual cost applied to each block and such cost to be covered as set forth in subparagraphs D and E below. None of the 200,000 shares of stock were allocated or credited to the account of any participant but all such shares were held by the Trustee for distribution without cost to participants reaching retirement status. The method of determining the number of shares a retiring participant receives is set forth in Article 10 of the Plan as follows:

"(b) 1. * * * the retiring participant will receive without cost, from the 50,000 share block of J. C. Penney Company common stock, that number of shares (but never in excess of 1,000 shares) rep-

resented by the proportion of 150,000 shares that the participant's total contributions at the time of his or her retirement bear to the aggregate of such contributions of all participants in the Fund at such time—except that at any time that any cost determined as applying to the 50,000 share block is not covered by credits, the participant, in order to receive any shares, must pay the Trustee or have deducted from the amount available for the purchase of his annuity, the net debit cost at the time of retirement of the shares to which he or she is entitled.

“2. When the 50,000 share block of stock is exhausted, distribution on retirement shall be from the 150,000 share block, based on the proportion of the remaining shares that the retiring participant's total contributions at the time of his or her retirement bear to the aggregate contributions of all participants at such time. In such event, the stock shall be delivered to the retiring participant without charge and there shall be charged against the Reserve for Retirement account the uncovered cost of the stock delivered to any retiring participant as represented by the stock account of the Fund. The number of shares to be distributed to any participant shall be limited to 1,000.”

In January, 1946, the common stock of the Company was split three-for-one and the 50,000 share block, after distribution of 7,163 to participants retiring in 1945, became 128,511 shares and the 150,000 share block became 450,000, the maximum number of shares distributable to a retiring participant becoming 3,000. To December 31, 1953, all distributions

of stock to retiring participants were made from the original 50,000 share block.

D. The Company's contributions measured by salary under Article 6(a) of the Plan were credited to the \$1,500,000 cost of the 50,000 share block until that cost was entirely covered in September, 1941, by this contribution for 1940 amounting to \$102,206.97 and dividend credits of \$1,397,793.03. Thereafter such contributions were credited to the Reserve for Retirement Account for the purpose of covering the \$4,500,000 cost of the 150,000 share block. On December 31, 1953 there was in the Reserve for Retirement Account the sum of \$2,149,996.23 and the balance of uncovered cost to be covered by future annual Company contributions measured by salary under Article 6(a) was \$2,350,003.77.

E. After payment therefrom of interest on the money borrowed to purchase the stock and incidental Plan expenses not borne by the Company, dividends received by the Trustee on the 200,000 shares of stock (including the dividend credit of \$300,000 representing the equivalent of dividends of \$1.50 per share paid by the Company on its outstanding common stock in 1940 prior to the date the Trustee purchased the stock, being the adjustment provided for in Article 5 of the Plan) were applied to cover the cost of the 50,000 share block of stock, which was covered in September, 1941. Dividends received by the Trustee thereafter were credited to the Dividend Account. On August 8, 1945, the Trustee paid the Company \$300,000, the amount of the adjustment referred to above, as an addition to the purchase

price of the stock which payment was charged against the Dividend Account. Participants' accounts were credited with their proportionate share of the net balance in the Dividend Account upon their retirement or other separation from the Plan.

32.

Upon separation from the Plan, whether for retirement or otherwise, the total credits to the account of each participant consisted of:

- (a) all of his own contributions;
- (b) his share of the Company's contributions measured by profits;
- (c) his share of the Dividend Account;
- (d) his share of the net earnings of the Fund; and
- (e) commencing with July 1, 1949, his share of the insurance companies' rate credits (dividends) paid under the Group Annuity Contracts effective March 1, 1948.

33.

The Plan provided that a participant reaching retirement status would receive a paid-up non-assignable annuity purchased with his total Plan credits on the date of his retirement, together with the number of shares of Penney Company stock to which he was entitled under the formula provided in the Plan. Retirement for a participant was to be effective on July 1st of the year in which he reached retirement status.

34.

The Plan provided that a participant leaving the Plan for any reason prior to reaching retirement

status, or in the case of death, his beneficiary, would receive in cash his total Plan credits as of the date of his separation. After March 1, 1948, such a participant received such credits in the form of deferred annuities surrenderable for cash with rights in his beneficiary if participation ceased because of death to receive such amounts under the death benefit provisions of the Group Annuity Contracts held by the Trustee. No participant leaving the Plan for any reason (including death) before reaching retirement status was entitled to receive any of the shares of stock held by the Trustee for distribution to retiring participants.

35.

During the period 1940 to 1953, both inclusive, the total receipts of the Trust Fund under the Plan were \$93,478,047.51, comprised of the following items:

Dividends on Penney Company	
stock held by the Trustee.....	\$18,767,057.95
Company contributions under	
Article 6(a)	2,252,203.20
Company contributions under	
Article 6(b)	17,986,969.84
Participants' contributions	50,170,113.52
Fund Earnings	1,015,799.08
Rate Credits (dividends) from in-	
surance companies (after 1948)	3,285,903.92

36.

During the period 1940 to 1953, both inclusive, credits withdrawn by participants ceasing participa-

tion before reaching retirement status aggregated \$13,169,736.56, comprised of the following items:

Dividends on Penney Company	
stock held by the Trustee.....	\$2,316,228.13
Company contributions under Ar-	
ticle 6(b)	2,477,527.66
Participants' contributions	7,850,563.22
Fund Earnings	206,889.92
Rate Credits (dividends) from in-	
surance companies (after 1948)	318,527.63

37.

During the period 1940 to 1953, both inclusive, credits withdrawn by participants who reached retirement status aggregated \$10,981,476.76 comprised of the following items:

Dividends on Penney Company	
stock held by the Trustee.....	\$2,124,514.64
Company contributions under Ar-	
ticle 6(b)	2,054,182.49
Participants' contributions	6,357,747.93
Fund Earnings	190,600.93
Rate Credits (dividends) from in-	
surance companies (after 1948)	254,430.77

38.

In accordance with the provisions of the Plan, the Company's annual contributions measured by salaries under Article 6(a), totaling \$2,252,203.20 from 1940 to 1953, have been used for the purpose of covering the cost of the 200,000 shares of stock, as ex-

plained in Finding of Fact 31, subparagraph D, and no part of such contributions was credited to participants' accounts or withdrawn by participants.

39.

On December 31, 1953, participants' total credits under the Plan amounted to \$65,636,598.36, covered to the extent of \$63,286,594.59 by Fund assets consisting of cash on hand and receivable, Government bonds and deferred annuities issued by four insurance companies. The total direct contributions to such assets by the participants amounted to \$35,961,802.37. The difference of \$2,350,003.77 between participants' total credits and the foregoing Fund assets represented the remaining uncovered cost on the books of the Fund of the original 150,000 share block of stock, to be covered by the Company's annual 2% of salary contribution under Article 6(a). In addition to the foregoing assets the Trustee held on December 31, 1953 for distribution to retiring participants under the terms of the Plan 483,754 shares of Penney Company stock, having a market value of \$36,039,673.00. Penney Company has had an unbroken profit and dividend record from the time of its incorporation in Delaware in 1924.

40.

On July 1 of each year commencing with the year 1945 each participant who had attained, or in that year attained, the age of 60, as defined in the Plan, received a paid-up non-assignable annuity purchased with his Plan credits and, without cost, a number of

the shares of stock held by the Trustee computed under the formula of the Plan. By December 31, 1953 the Trustee had distributed to such retiring participants the total of 101,920 shares of Penney Company stock held by it in the Fund under the Plan, of which 7,163 were distributed prior to the three-for-one stock split in 1946.

41.

Each participant whose participation ceased prior to July 1, 1945, or thereafter but prior to such participant's reaching age 60, as defined in the Plan, or in case of death, his beneficiary, received his Plan credits as of the date his participation ceased but did not receive any of the shares of stock held by the Trustee.

42.

The purposes of the Plan were:

- (a) to inaugurate a compulsory retirement policy,
- (b) to help provide security for the future,
- (c) to provide liberal benefits on retirement and earlier separation,
- (d) to constitute an improvement over the former outright sales of Penney Company stock from time to time to associates, and
- (e) to act as a further incentive to those who were serving and preparing to serve
 - (i) by providing for credits to accounts from Company contributions measured by profits and from dividends on the Penney Company stock held in the Trust, and

- (ii) from the potential ownership of Penney Company stock to be received upon reaching retirement status.

43.

The stock provisions of the Retirement Plan are an integral part of the Plan.

44.

The provisions of the Plan, including those for mandatory retirement, acquisition of Penney Company stock by the Trustee, distribution of such stock to participants reaching retirement status, use of dividends for the benefit of participants leaving the Company upon retirement or earlier separation, participants' contributions and Company contributions, constitute a unified structure, and each such provision is inseparable from the Plan as a whole.

44½.

A. From the inception of the Plan in 1939 through 1953, the Administrative Committee consisted of men who were participants in the Plan, except that from July 1, 1951 to April, 1953, Mr. A. W. Hughes, who had ceased to be a participant, was on the Administrative Committee. The identity of such men changed from time to time.

B. From 1943 to April 20, 1946, the Operating Committee consisted of 8 men, 7 of whom were participants. From April 20, 1946 through 1951, said Committee consisted of 7 participants, except that from July, 1951, to the end of 1951, Mr. A. W. Hughes was on the Operating Committee, but he

was not a participant in the Plan during that period. During both periods the identity of the members of the Operating Committee changed from time to time.

C. From 1939 to 1951, the Board of Directors consisted of 11 men. From 1939 to 1945, 6 of said 11 men were participants in the Plan. In 1946, 5 of said 11 men were participants. In 1947, 6 of said 11 men were participants. From 1947 until 1950, 6 of the 11 were participants. In 1950 and until July 1, 1951, 6 of the 11 were participants. After July 1, 1951, 5 of the 11 were participants.

D. The men referred to in subparagraphs A, B and C above at no time used their position for their own benefit, and at all times acted in good faith and for the benefit of the trust.

45.

The Plan is liberal in that, although only participants reaching retirement status receive shares of stock in addition to their other credits, a participant leaving the employment of the Company at any time before reaching retirement status, regardless of his length of service or years of participation or the reason for his separation, not only receives back all of his own contributions to the Plan but also receives all other credits to his account, computed in the same manner as though he had reached retirement status.

46.

The fact that older employees, among them some members of the Company's Board of Directors, who

were among the first to qualify for retirement with stock, received a slightly greater number of shares than younger and future employees will receive when they retire, does not render the Plan unfair or discriminatory. There is a sound and rational basis for permitting employees who have not built up large credits for themselves under other provisions of the Plan to receive an advantage in connection with the distribution of stock under the formula set forth in Finding of Fact 31, subparagraph C.

47.

The Plan is generous and sound.

48.

The Plan does not:

- (a) encourage any passion for gambling,
- (b) take money from people who can ill afford to lose it,
- (c) encourage hope of gain without service or effort,
- (d) induce habits of waste, idleness or hatred of honest labor,
- (e) promote deterioration of moral qualities, or
- (f) discourage useful business and industry.

The Plan is not a lottery or a wagering contract; neither is it a Tontine contract.

49.

There is no proper basis for attacking the integrity of the executive officers and members of the Penney Company Board of Directors who were re-

sponsible for the adoption of the Plan, and who are responsible for its administration.

50.

Plaintiff Wells, during the period of his participation in the Plan from January 1, 1940 to August 31, 1948, received from the Penney Company regular salary totaling \$29,955, and in addition Manager's Contract Compensation totaling \$56,924.22. He contributed \$13,929.70 from his Contract Compensation to the Trust Fund under the Plan.

51.

On ceasing participation in the Retirement Plan on August 31, 1948 at the age of 52 years, plaintiff Wells had total credits in the Fund of \$22,563.48, consisting of:

(a) the total of his own contributions amounting to	\$13,929.70
(b) his share of the Company's excess profit contributions through 1947 amounting to.....	4,075.52
(c) his share of the Dividend Account at August 31, 1948, amounting to	4,558.26
	<hr/>
	\$22,563.48

All these credits were used to purchase for him installment refund annuities which plaintiff Wells elected to cancel, receiving his total credits of \$22,563.48 in cash. In addition he received on April 1,

1949, \$643.83 representing earning credits of the Fund.

52.

Plaintiff Albertsen, during the period of his participation in the Plan from January 1, 1940 to December 31, 1950, received from the Penney Company regular salary totaling \$48,900, and in addition Manager's Contract Compensation totaling \$137,052.71. He contributed \$30,213.13 from his Contract Compensation to the Trust Fund under the Plan.

53.

On ceasing participation in the Retirement Plan on December 31, 1950 at the age of 54 years, plaintiff Albertsen had total credits in the Fund of \$52,967.81, consisting of:

(a) the total of his own contributions amounting to.....	\$30,213.13
(b) his share of the Company's excess profit contributions through 1950 amounting to.....	10,386.23
(c) his share of the Earnings credit through 1950 amounting to.....	1,104.89
(d) his share of the Dividend Account at December 31, 1950, amounting to	10,280.94
(e) his share of insurance companies' rate credits (dividends) under the Group Annuity Contracts amounting to	982.62

Total \$52,967.81

All these credits were used to purchase for him installment refund annuities under which payments would commence on August 1, 1956, the year in which he would be 60, which annuities are still in force.

54.

There is no evidence in the case that plaintiff Wells, plaintiff Albertsen or any other former participant in the Plan, who did not attain retirement status, made any claim between 1940 and the commencement of this action that the Plan or Trust Agreement were invalid in any way.

55.

Plaintiffs Wells and Albertsen, as well as all former participants in the Plan who did not achieve retirement status, have accepted benefits which have included large contributions by the Penney Company. The Penney Company made its original contribution and its subsequent contributions to the Plan on the basis of acceptance forms signed by all participants in which they agreed to be bound by the terms of the Plan and Trust Agreement, and on the basis of the validity of the Plan.

56.

The action brought by plaintiffs Wells and Albertsen is brought by them on behalf of themselves and on behalf of those persons who were participants in the Plan during 1940 and 1941 and whose contributions formed one source of the receipts used by the Trustee in repaying the loan to the Continental

Bank and who separated from the Plan without attaining retirement status, and the heirs, legal representatives and beneficiaries of such former participants.

57.

The persons on whose behalf the plaintiffs Wells and Albertsen have brought this action constitute a class of former participants so numerous (being in excess of 690) that it is impracticable to bring them all before the Court. Such former participants are similarly situated with respect to the said named plaintiffs and have no interests that are in conflict with those of the named plaintiffs and are adequately represented by said named plaintiffs.

58.

It would be highly inequitable to permit plaintiffs Wells and Albertsen to recover in this proceeding, either on their own behalf or on behalf of the class for which they are suing.

Based upon the foregoing Findings of Fact the Court now makes the following:

Conclusions of Law

1.

Diversity of citizenship exists between plaintiffs Wells and Albertsen and defendants and has existed since the commencement of the action. The amount in controversy exceeds, exclusive of interest and costs, \$3,000.00. The Court, therefore, has jurisdiction over this case under 28 U.S.C. Sec. 1332.

2.

This action is properly maintainable in this Court by the plaintiffs Wells and Albertsen as a class action under Rule 23(a)(1) of the Federal Rules of Civil Procedure.

3.

The Trustee adequately represents the interests of all present participants in the Plan and it is therefore not necessary that such participants be made parties in this action under Rule 19 of the Federal Rules of Civil Procedure.

4.

The J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff) and Trust Agreement in connection therewith are to be construed in accordance with the laws of the State of New York.

5.

The stock distribution provisions of the Penney Company Retirement Plan are valid and legal and do not involve a lottery or other illegal scheme.

6.

The prohibition against lotteries, bookmaking and gambling in the New York Constitution and the New York Statutes defining a lottery were never designed to nor do they cover a situation of the kind involved in this action in which stock is distributed to employees who qualify under retirement or pension plans.

7.

The provisions of the Penney Company Retirement

ment Plan under which stock is held for distribution to employees who attain retirement status do not violate the prohibition against lotteries, bookmaking and gambling in the New York Constitution and the New York Statutes.

8.

The stock distribution provisions of the Penney Company Retirement Plan do not violate the public policy of the State of New York.

9.

The stock provisions of the Retirement Plan are an integral part of the Plan.

10.

Whether the stock provisions are considered separately or in connection with other portions of the Retirement Plan, the distribution of stock to only those persons who reach retirement age and otherwise qualify under the Plan is a valid and legal arrangement.

11.

The Retirement Plan and Trust Agreement and amendments thereto have at all times been qualified as an employees' trust under Sections 165 and 165(a) of the Internal Revenue Code.

12.

The stock provisions of the Retirement Plan do not conflict with Federal tax law.

13.

The fact that older employees, among them some

members of the Company's Board of Directors, who were among the first to qualify for retirement with stock, received a slightly greater number of shares than younger and future employees will receive when they retire, does not render the Plan fraudulent or illegal.

14.

There is no basis for attacking the integrity of the executive officers and members of the Penney Company Board of Directors who were responsible for the adoption of the Plan, and who are responsible for its administration.

15.

The Retirement Plan and Trust Agreement became a binding contract between the Penney Company and each participant, including plaintiffs, when such participant executed and delivered to the Penney Company his Participant's Acceptance Form.

16.

All funds received by the Trustee from Company contributions, participants' contributions, dividends on Penney Company stock and earnings of the Fund together with the 200,000 shares of Penney Company stock became the property not of any participant, but of the Trustee, subject only to the terms of the Retirement Plan and Trust Agreement.

17.

In one sense, all of the company's contributions can be characterized as being part of the compensa-

tion paid to participants; but that does not mean that the participants were entitled to receive such contributions or the benefits thereof in a manner other than that specified in the Plan itself; nor does it mean that the loan with which the stock was purchased was repaid solely from funds contributed by the participants.

18.

No participant had or has any right or interest with respect to the shares of Penney Company stock at any time held by the Trustee of the Plan except as prescribed by the terms and conditions of the Plan.

19.

The Court has already found that the Plan is valid, but even if by some technical construction the Plan was found to constitute a lottery or other illegal scheme, it would, under all the facts and circumstances herein, be highly inequitable to permit plaintiffs to recover either on their own behalf or on behalf of the class for which they are suing.

20.

Neither plaintiffs nor any member of the class whom they represent is entitled to receive any shares of the Penney Company stock held by the Trustee of the Penney Company Retirement Plan.

21.

Defendants are entitled to have judgment entered in their favor and against plaintiffs Wells and Al-

erick Yerke, Jr., and Paul R. Meyer (King, Miller, Anderson, Nash & Yerke), of their attorneys. Defendant, J. C. Penney Company, a corporation appeared by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, McColloch & Dezendorf), W. H. Dannat Pell, Henry Stone and C. Robert Roll (Pell, Butler, Curtis & LeViness), of its attorneys. Defendant, The Chase National Bank of the City of New York, a national banking association, a predecessor in interest to defendant The Chase Manhattan Bank, a corporation, appeared by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, McColloch & Dezendorf), of attorneys for said Defendant. Said The Chase Manhattan Bank having, subsequent to trial but prior to judgment herein, been substituted as a party defendant in place of The Chase National Bank of the City of New York at this time appears by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, McColloch & Dezendorf), of attorneys for said substituted defendant.

The issues raised by the Pre-trial Order having been duly tried and the Court having filed its opinion on the 29th day of December, 1955 and the Court on the day of, 1956 having filed its Findings of Fact and Conclusions of Law directing judgment as hereinafter provided and being fully advised in the precises, it is now

Ordered, Adjudged and Decreed, that judgment be and the same is hereby entered in favor of defendants; it is further

Ordered, Adjudged and Decreed, that the action

herein be and the same is hereby dismissed on the merits as to the plaintiffs, Harvey L. Wells and Harry J. Albertsen and as to each and every member of the class whom they represent.

Dated: Portland, Oregon this 8th day of March, 1956.

/s/ GUS J. SOLOMON,
District Judge

[Endorsed]: Filed March 8, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Harvey L. Wells and Harry J. Albertsen, on behalf of themselves, and others similarly situated, plaintiffs above named, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 8, 1956.

/s/ KING, MILLER, ANDERSON,
NASH & YERKE

/s/ RALPH H. KING

/s/ FREDRIC A. YERKE, JR.

/s/ PAUL R. MEYER

Attorneys for Plaintiffs

Acknowledgment of Service Attached.

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents that we, Harry J. Albertsen, as Principal, and United Pacific Insurance Company, a corporation of the State of Washington, having an office and usual place of business in the City of Portland, County of Multnomah, State of Oregon, as Surety, are held and firmly bound unto J. C. Penney Company and The Chase Manhattan Bank, defendants above named, in the sum of Two Hundred Fifty Dollars (\$250), lawful money of the United States of America, for which payment well and truly to be made unto said J. C. Penney Company and The Chase Manhattan Bank, their successors and assigns, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly, severally and firmly by these presents.

Whereas, lately in an action pending in the United States District Court for the District of Oregon between Harvey L. Wells and Harry J. Albertsen, on behalf of themselves, and others similarly situated, as plaintiffs, and J. C. Penney Company and The Chase Manhattan Bank, as defendants, a judgment was entered against plaintiffs, and plaintiffs having filed a notice of appeal from said judgment to reverse said judgment on appeal to the United States Court of Appeals for the Ninth Circuit,

Now the condition of this obligation is such that,

if the said plaintiffs shall pay the costs if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award against plaintiffs if the judgment *if* modified, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, Harry J. Albertsen, as Principal, and United Pacific Insurance Company, as Surety, have caused their names to be hereto signed by their representatives duly authorized thereto, and said Surety has caused its corporate seal to be hereto affixed by its attorney in fact, this 2nd day of April, 1956.

HARRY J. ALBERTSEN
By FREDRIC A. YERKE, JR.
Of his Attorneys

UNITED PACIFIC INSURANCE
COMPANY

[Seal] By EMMA M. KEMP,
Attorney in Fact

Acknowledgment of Service Attached.

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL
EXHIBITS

Plaintiffs having designated the following exhibits to be included in the record on appeal in the above entitled and numbered action, pursuant to the provisions of Rule 75 (i) of the Federal Rules of Civil Procedure, and the court having considered the matter and being fully advised in the premises, it is hereby

Ordered that the clerk of this court transmit to the clerk of the United States Court of Appeals for the Ninth Circuit the originals, in lieu of copies, of the following Exhibits:

1, 1A, 2 through 9, 12, 14, 16, 18, 20, 22, 31, 37 through 39, 51, 55, 67 through 77, 79, 90, 91, 96, 99, 102 through 104, 109, 111, 114, 115, 120, 122 through 127, 129 through 139D, 140, 141, 145 through 155, 174, 175, 185 through 193, 194 through 207, 208A through D, 210, 211, 215A through H, 222A through D, 227A, 233 through 244, 245 through 254H, 260 through 263, 280, 282A through J, 292, 303 through 305, 309 through 311, 312A through D, 313 through 320, 323 through 326, 329 through 335.

Dated this 13th day of April, 1956.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed April 13, 1956.

In the United States District Court
for the District of Oregon

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer of defendant the Chase National Bank of The City of New York; Answer of defendant J. C. Penney Company; Opinion of Judge Solomon; Order of substitution of party defendant; Findings of fact and conclusions of law; Final judgment; Notice of appeal; Bond on appeal; Designation of contents of record on appeal; Order transmitting original exhibits and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6095 in which Harvey L. Wells and Harry J. Albertsen, on behalf of themselves, and others similarly situated are the appellants and J. C. Penney Company, a corporation, and The Chase Manhattan Bank, a corporation, successor in interest to The Chase National Bank of the City of New York are the appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings. The Pre-

trial order is being forwarded under separate cover and the exhibits are being forwarded by the attorneys for the appellants.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 9th day of May, 1956.

[Seal] R. DE MOTT,
Clerk

By THORA LUND,
Deputy

United States District Court
District of Oregon

Civil No. 6095

HARVEY L. WELLS and HARRY J. ALBERT-
SEN, on behalf of themselves and other simi-
larly situated, Plaintiffs,
vs.

J. C. PENNEY COMPANY, a corporation, and
THE CHASE NATIONAL BANK OF THE
CITY OF NEW YORK, a national banking
association. Defendants.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, June 23, 1954

Before: Honorable Gus J. Solomon, District Judge.

Appearances: Messrs. Ralph H. King, Fredric

A. Yerke, Jr., and Paul Meyers, of Attorneys for Plaintiff. Messrs. Clarence J. Young, W. H. Dan-net Pell, Henry Stone, Robert Roll, and Wayne Hilliard, of Attorneys for Defendants.

Court Reporters: Gordon R. Griffiths and John S. Beckwith. [1*]

The Court: Let's consider the time for filing briefs in the Wells-Albertsen case. When can you get in the first brief?

Mr. King: It is pretty hard to write two briefs at the same time. We could probably have our brief in by the date that theirs is due in the other case, on the 10th of August.

The Court: You will have until the 10th of August for the first brief.

Mr. Young: And three weeks for us, your Honor, thereafter.

The Court: That is September 1st. How about the 14th of September for the reply?

Mr. King: That is fine.

The Court: Then I will try to get the decision out by the end of September.

Has the Pre-Trial Order in the Wells-Albertsen case been signed already?

Mr. King: Yes, it has, your Honor.

Mr. Young: Yes.

Mr. King: There is that one page to be substituted.

The Court: I have already signed it, and I

* Page numbering appearing at top of page of Reporter's original certified Transcript of Record.

think Mr. Bishop has made the change. I have read the Pre-Trial Order in its entirety on this one.

Mr. King: Very well, your Honor. We this [2] morning handed Counsel for the defendants——

Mr. Young: If the Court please, may I interrupt Counsel just a moment?

At this time the defendants move the Court for an order dismissing the Wells-Albertsen action upon the ground that on the basis of the facts shown in the Statement of Agreed Facts in the Pre-Trial Order it is clear that the Plan and Trust Agreement in so far as they relate to the stock feature cannot conceivably be a lottery, as the plaintiff claims; that the Penney Company's retirement plan, approved by the stockholders of the company in 1940, serves a valid business purpose in providing benefits for the members of the Management staff of the company, approximately 1950 of whom are now participants.

The grounds upon which the plaintiffs claim it is a lottery are that the stock held by the Trustee of the Plan is only distributable to participants reaching the retirement age of 60 and who remain in the employ of the company until that age. As a matter of law, such conditions imposed upon the right to receive these shares of stock cannot convert this plan or any part of it into a lottery; that the condition requiring service in the company's employ until age 60 is a valid part of the contract of employment between the participants and the company.

The Court: The motion is denied. Go ahead. [3]

That means without prejudice. I may find with you subsequently, but at this stage I am going to listen to all the evidence.

Mr. Young: I understand.

Mr. King: This morning, your Honor, we presented counsel for the defendants with a list of the exhibits which we desire to offer at this time and which I will read into the record:

Exhibits 1, 1-A, 2, 3, 4, 5, 6, 23, 55, 74, 75, 76, 77, 123, 124, 125, 140, 141, 159, 160, 185, 186, 187, 188, 189, 190, 191, 192, 193, 208-A, 208-B, 208-C, 208-D, 210, 211, 222-A, 222-B 222-C, 222-D, 329, 330, 331, 332, 333 and 334.

The Court: Are you prepared to——

Mr. Young: No, we are not, your Honor.

The Court: All right. Tomorrow morning.

Mr. Young: May I ask until tomorrow morning at 10:00 o'clock?

The Court: Yes. Do you know at this time what exhibits you propose to offer?

Mr. Young: No, we don't, your Honor.

The Court: All right. At 10:00 o'clock tomorrow morning. Would you mind giving Mr. King a statement around 9:30 tomorrow morning?

Mr. Young: Yes, your Honor.

Mr. King: Thank you, your Honor.

Now, your Honor, following the suggestion [4] your Honor made the other day, in order to avoid repetition, with the consent of Counsel I would like to indicate the portions of the following depositions that I would like to have set forth in the record as

if they had been read into the record in the usual procedure.

The Court: Is there any objection to that, Mr. Young?

Mr. Young: I have no objection to the principle of avoiding repetition. We merely will wish to reserve our objections to the relevancy or materiality of the particular sections.

The Court: That is all right. You can do that.

Mr. Young: May I make this inquiry, your Honor? It is a technical matter of taking these page by page. May we have until tomorrow morning also to note our objections to the portions?

The Court: Oh, yes. I will assume that you are objecting to everything.

Mr. Young: That is a fairly safe assumption, your Honor.

Mr. King: The first is the deposition of A. J. Raskopf, and the portions are:

Beginning at the beginning of the deposition on Page 3 and continuing to the end of the fourth line from the bottom of Page 7, which reads, "Mr. Young: It may be so stipulated." [5]

Excerpts From Deposition of

A. J. RASKOPF

"A. J. Raskopf, called as a witness, being duly sworn, testified as follows:

"Mr. King: Mr. Young has some stipulations that he wishes to place in the record, and as I understand it, Mr. Young, they will be applicable to

(Deposition of A. J. Raskopf.)

all the depositions that are taken in New York without being reinserted in the record under such separate deposition, is that correct?

“Mr. Young: That is correct. Proceeding, then, Mr. King, with the stipulations, they are as follows:

“Notices of taking depositions of certain witnesses have been served in each of the two pending cases, namely Burkitt versus Penney Company and Chase Bank and Wells and Albertsen versus the same defendants; in addition, subpoenas for certain witnesses have been served; it is agreed, however, that to avoid the necessity of taking each deposition twice the court reporter may designate two copies of the depositions as originals, one for use in so far as applicable in the Burkitt case, the other for use in so far as applicable in the Wells and Albertsen case. This understanding, however, is without prejudice to the rights of the defendants [6] to contend that the two actions should or should not be consolidated for trial.

“It is further stipulated that notwithstanding the circumstance that the notices of taking depositions and subpoenas served fix specific times for the hearings at the board of directors’ room of J. C. Penney Company in New York, the actual time when any specific deposition is taken shall be fixed in accordance with the reasonable convenience of witness and counsel.

“In addition, to avoid the necessity of transporting voluminous documents from The Chase Bank in New York City to the board of directors’ room

(Deposition of A. J. Raskopf.)

of the Penney Company in the same city, the depositions of the witnesses Gardner and Burrows may be taken at the conference room of The Chase National Bank, No. 15 Broad Street, New York City.

“It is further stipulated that in respect to any original documents which may be identified as exhibits to any deposition photostats or other true and complete copies may be substituted with the same force and effect as the original, and such original document may be withdrawn by any party who produces such documents. [7]

“Mr. King, there is one other general stipulation that I had in mind, but I would suggest that you dictate at this time the specific ones that you wish, and then I can add one further at the end.

“Mr. King: The stipulations proposed by Mr. Young are acceptable.

“I offer the following stipulation:

“That the pages of the deposition of each witness be numbered consecutively and that any further depositions taken, whether intervening or not, be numbered consecutively throughout the entire depositions to be taken under the notices now outstanding at New York.

“It is further stipulated that a notary other than Mr. Bonyngé may swear witnesses, but that Mr. Bonyngé shall make the certificate to the deposition of such witnesses and shall make a separate certificate for each witness in each of the two cases.

“Mr. Young: The purpose of this portion of

(Deposition of A. J. Raskopf.)

your stipulation is to make it possible as I understand for Mr. Bonyngé to provide us with daily copy.

“Mr. King: That is right.

“Mr. Young: Is that all that you have, [8] Mr. King?

“Mr. King: It is further stipulated that in reading any deposition taken as provided in the notices and foregoing stipulations the word ‘plaintiffs,’ plural possessive, and ‘plaintiff’s,’ singular possessive or ‘plaintiffs,’ plural, or ‘plaintiff,’ singular, shall be read in accordance with the heading of the case in which the deposition is returned.

“It is further stipulated that exhibits produced on the various depositions shall be numbered consecutively, commencing with those produced in the first deposition and continuing through to the end of all depositions to be taken.

“Mr. Young: The stipulations as you have dictated them are satisfactory to the defendants. I do want to get this general stipulation if it is agreeable to you, that except as otherwise stipulated specifically between counsel it is understood that the depositions in the Burkitt case and the Wells and Albertsen case are subject to and governed by the applicable Rules of Civil Procedure.

“Mr. King: I would suggest a further stipulation, Mr. Young. May it be stipulated that [9] unless at the time an exhibit is offered for marking as an exhibit you specifically interpose an objection to its proper identification that it shall be deemed

(Deposition of A. J. Raskopf.)

that the identification of the exhibit was sufficient and proper, but that the same shall be subject to your objection as to materiality and relevancy in subsequent proceedings?

"Mr. Young: It may be so stipulated."

Then, turning to Page 9, the first two questions and answers:

"Q. Your name is A. J. Raskopf?"

"A. That is right.

"Q. And where do you reside?"

"A. Garden City, Long Island, New York."

Beginning again at the bottom of Page 9 with the question, and continuing to the third line on Page 10:

"Q. And what year were you elected secretary?"

"A. As of January 1, 1932.

"Q. And you have been secretary ever since that date?"

"A. I have."

Page 112, beginning with the first question which appears about the center of the page, and going through the marking of the exhibit, which is right about the middle of [10] Page 113:

"Q. Have you a copy of the profit-sharing plan presented to the meeting of the stockholders on March 21, 1940?"

"A. I have a copy of the Retirement Plan which was presented at the stockholders' meeting of March 21, 1940.

"Q. It was presented there for their consideration, wasn't it?"

"A. Yes, it was there, and available for——

(Deposition of A. J. Raskopf.)

“Q. That is the one that is referred to in the minutes of that meeting, is it not? “A. Yes.

“Mr. King: I ask that that be marked Exhibit 1-A to the deposition of this witness.

“Mr. Stone: You want it marked Exhibit 1-A?

“Mr. King: Yes, it relates to those minutes and therefore comes right in as a part of it.

“Mr. Stone: It is just out of order.

“Mr. King: It is with the intent that you can work it in and go down the line of the index and get a statement of the attachments that relate to it.

“(Document headed ‘Profit-Sharing Retirement Plan (for J. C. Penney Company [11] management staff)’ consisting of 17 photostatic sheets, was marked Plaintiffs’ Exhibit 1-A for identification, Deposition of A. J. Raskopf, Cases 5965 and 6095, October 29, 1951, C. B.)”

Now, going from there to Page 424, beginning with the first question on that page, and continuing through Line 4 on Page 425:

“Q. Mr. Raskopf, according to some of the minutes now in evidence steps were taken by you as representing the company to qualify this profit-sharing retirement plan under Section 165-A of the Internal Revenue Code.

“A. That is right.

“Q. Can you state whether or not the contributions made by the company under paragraphs 6-A and 6-B of the Plan have been taken by the

(Deposition of A. J. Raskopf.)

company as deductions of compensation in the returns filed with the Internal Revenue Bureau?

"A. No, Mr. King, they have not been taken as deductions as compensation. They have been taken as deductions for contributions to the retirement plan.

"Q. Under Section 165-A of the Code?

"A. Yes. [12]

"Q. But they have been ever since the Plan was first effective? "A. Yes, sir."

That is all there is of the deposition of Mr. Raskopf.

Now, taking up next the deposition of Herbert H. Schwamb, Page 691, beginning at the top of the page, and continuing through the seventeenth line on Page 693, which line is also the seventh line from the bottom and ends with the words "Yes, sir."

Excerpts From Deposition of

HERBERT H. SCHWAMB

"Herbert H. Schwamb, called as a witness, being duly sworn, testified as follows:

"Mr. King: I wish to call your attention to the fact that the notice of the taking of the deposition of Mr. Schwamb does not give notice of the taking of his deposition in the capacity of a vice-president of J. C. Penney Company. I wish to inquire as to whether or not you are willing to stipulate that Mr. Schwamb may be examined as a vice-president

(Deposition of Herbert H. Schwamb.)

of J. C. Penney Company and his deposition taken in that capacity.

“Mr. Young: It is so stipulated.

“Direct Examination

“Q. (By Mr. King): Will you state your name to the reporter, please. [13]

“A. Herbert H. Schwamb.

“Q. Where do you reside?

“A. 45 West 54th Street, New York.

“Q. You started with the predecessor of the present company in about 1923?

“A. I think it was the present company in 1923.

“Q. The record indicates that the present company commenced business January 1, 1925.

“A. It has always been one and the same to me.

“Q. At any rate, you started in with the J. C. Penney Company in 1923? “A. Yes.

“Q. You are not sure whether it was then incorporated under the laws of Utah or the present company incorporated under the laws of Delaware?

“A. I did not know that.

“Q. About 1940 you succeeded Mr. A. W. Hughes as the person in charge of the personnel department? “A. On January 1, 1940.

“Q. And upon the inception of the Profit-Sharing Retirement Plan and pursuant to action taken by the board of directors at meeting held December 5 and 6, 1939, you became a member of the administrative committee under that Plan?

“A. Yes. [14]

(Deposition of Herbert H. Schwamb.)

"Q. By virtue of your position as head of the personnel department, about January 1, 1940, you became a member of the operating committee?

"A. Yes, sir.

"Q. And by virtue of the adoption of the Profit-Sharing Retirement Plan and the actual operation commencing sometime in July or August, 1940, you became a participant thereunder?

"A. Yes, sir.

"Q. And have been ever since? "A. Yes.

"Q. Did you realize at the time that you became a participant under the Plan that in the event of your failure to attain a retirement status, on account of death, physical disability or discharge or voluntary resignation you would lose your opportunity to obtain any shares of stock?

"A. I certainly did.

"Q. You understood that as a participant?

"A. Yes, sir.

"Q. And you were willing to accept that hazard? "A. Yes, sir."

That is all of the deposition of Mr. Schwamb.
Then the deposition of John I. H. Herbert. On Page 660, all of that page: [15]

Excerpts From Deposition of

JOHN I. H. HERBERT

"Mr. King: Gentlemen, in the notice of the taking of the deposition of Mr. J. I. H. Herbert he was not described as a director of the J. C. Penney

(Deposition of John I. H. Herbert.)

Company. I wish to inquire now whether it may be stipulated or will be stipulated that his deposition may be taken in his capacity as a director of J. C. Penney Company.

"Mr. Young: No objection.

"Mr. King: I want to know whether it is so stipulated.

"Mr. Young: Yes, it is so stipulated."

Page 661, beginning at the first question on that page, through the fifth line on Page 662:

"Q. Would you state your name?

"A. John I. H. Herbert.

"Q. Where do you reside?

"A. 10 Cooper Road, Scarsdale, New York.

"Q. I believe you started in with the J. C. Penney Company about 1911.

"A. I went with Mr. J. C. Penney in 1911, May 8th.

"Q. And you were a director and treasurer of the Utah company from about 1913 to 1924?

"A. I was until the new company took over.

"Q. And after the new company was formed, the present company, you became a [16] director in that company? "A. Correct.

"Q. And also served in a capacity as treasurer and third vice-president? "A. Right.

"Q. Do you remember this Profit-Sharing Retirement Plan that was inaugurated in 1940?

"A. I do.

"Q. I show you Exhibit 125, being the booklet which the record indicates was sent out in the year

(Deposition of John I. H. Herbert.)

1940. Did you receive one of those as a participant in the Plan? "A. I did."

Page 663, beginning with the first question on that page, through the tenth line on that page, which reads, "I was."

"Q. At the time you became a participant in the Profit-Sharing Retirement Plan did you know that you might lose any opportunity to receive the stock, by reason of your death or physical incapacity or discharge prior to attaining retirement status? "A. I did.

"Q. And you were willing to accept that [17] hazard, were you?

"A. I was."

That is all of the deposition of Mr. Herbert.

Taking up the deposition of

MR. WEIDERMAN

Page 194, commencing with the first question, to the end of that page:

"Q. Will you state your name, please.

"A. R. C. Weiderman.

"Q. Where do you reside, Mr. Weiderman?

"A. Manhasset, New York.

"Q. And what is your present official position with J. C. Penney Company? "A. Comptroller.

"Q. And you have served in that capacity since December 3, 1945? "A. Yes.

"Q. Prior to that were you Assistant Comptroller? "A. Yes.

(Deposition of R. C. Weiderman.)

"Q. For about how many years?

"A. About six months.

"Q. And when did you first become connected with the company? "A. In June, 1916.

"Q. In the Comptroller's department, was it?

"A. All of the time except about 20 months [18] in one of the purchasing departments back in 1920."

Page 223, beginning with the second question on that page, which is in the fifth line, to the end of Line 3 on Page 225:

"Q. Now, Mr. Weiderman, when a person retires under this profit-sharing retirement plan he gets a certain number of shares of stock. Is that correct? "A. That is correct.

"Q. And does he also get a percentage of the dividend account?

"A. No, sir. Pardon me. That is used to buy him an annuity.

"Q. I know, but he gets the benefit of it, the money back?

"A. He gets it in the form of an annuity.

"Q. He gets the amount of money to be applied toward his annuity, which is based upon a percentage of the then dividend account, is that correct? "A. That is correct.

"Q. Suppose that he applies for retirement and is refused retirement. What becomes of the shares which he would have received if he had been retired? "A. They remain in a trust.

"Q. Who do they go to? [19]

(Deposition of R. C. Weiderman.)

"A. That is a very hard question to answer. I would not be able to answer that question who they go to.

"Q. It is what?

"A. I would not be able to answer the question who they go to.

"Q. You could answer this part, could you not, they go to someone other than the person that is denied retirement, do they not?

"A. Eventually they might go to somebody else.

"Q. You mean that they might keep denying retirement to everybody, so that they never go to anybody, is that correct?

"A. They cannot deny retirement to everybody in the Plan because every man who reaches 60 must be retired.

"Q. Directing your attention to Exhibit 140 to your deposition, being headed 'Participants out between 1/1/41 and 7/1/45 who were 60 years of age or over,' what became of the shares that would have gone to Mr. Pearson if he had been permitted to retire?

"A. They remained in trust.

"Q. What became of the shares that would have gone to Mr. McAlpine if he had been permitted to [20] retire?

"A. They remained in trust."

Page 228, beginning with the third question on that page, which begins at the beginning of the eighth line, through to the end of the fifteenth line

(Deposition of R. C. Weiderman.)

on Page 236, which reads: "as far as stock was concerned."

"Q. Mr. Weiderman, do the persons who are members of the general office compensation plan, Exhibit Y, hold contracts with the company covering their employment?

"A. I would say no to that question.

"Q. Do the managers of the respective stores of the J. C. Penney Company hold contracts covering their employment?

"A. Yes.

"Q. And has that been true since prior to 1940?

"A. I believe it was before 1940, Mr. King.

"Q. So that if a manager is employed and was employed, we will say, at or prior to January 1, 1940, he automatically became a participant under this profit-sharing retirement plan?

"A. If he had a contract that was effective on January 1, 1940, he actually was a participant.

"Q. And whether or not he became entitled to any stock under the provisions of that Plan, any [21] shares of stock, was contingent upon his reaching what is referred to in the Plan as 'Retirement status,' is that right?

"A. That is correct.

"Q. So that if he was killed or became incapacitated, physically incapacitated, to continue with his work he would thereby lose any possibility of acquiring any such stock?

"A. Under the terms of the Plan he would not be entitled to any stock.

(Deposition of R. C. Weiderman.)

“Q. And if he was discharged he would lose any right to stock?

“A. The same answer as to the question previously.

“Q. And that stock would be held in the Plan for the benefit of either the then participants or some later participant. Is that correct?

“A. I would say all stock in the Plan is held for the benefit of the participants of the Plan.

“Q. I mean that suppose a man had been a participant until he was 59 years and 360 days old and was killed on that day, the stock that he would have had five days later would become the potential property of the other participants in the Plan?

“A. It would become part of the Plan.

“Q. And the amount of stock that directors retiring [22] on July 1, 1945, receive would be increased by the fact that retirement had been refused to participants who were aged 55 during that year?

“The Witness: Could you read that question?

“(The question was read by the reporter.)

“The Witness: I am sorry, but I would like to have it read again.

“(The question was re-read by the reporter.)

“The Witness: I do not think that was the question. There are a lot of participants aged 55 who did not leave the company.

“Q. Yes, but on your list here, which is Exhibit 141, there was Mr. A. G. Dunn who was aged 55

(Deposition of R. C. Weiderman.)

and who was denied retirement and was shown as withdrawing from the Plan on June 30, 1945. If Mr. Dunn had been permitted to retire on July 1, 1945, the amount of stock received by Mr. Herbert would have been decreased, would it not?

"A. I cannot answer that question.

"Q. Did you not ever make a compilation to ascertain that?

"A. We did not.

"Q. Did you not assist Mr. Raskopf in preparing the proxy statement which is marked as Exhibit 60 to the deposition of Mr. Raskopf? [23]

"Mr. Pell: For what year is that?

"Mr. King: It is for the annual meeting—I will give you the year in just a minute—the year 1945 is the year. Exhibit 60 is the proxy statement for the annual meeting of the stockholders to be held on April 20, 1945.

"The Witness: I helped to prepare that statement.

"Q. Yes, and I would call your attention to the footnote 5 appearing on the—I guess you would call it the third page, which reads as follows:

" 'Mr. Herbert and Mr. Ross having reached the age of 60 years will be eligible for retirement on July 1, 1945, as participants in the Plan. In the event of their retiring as participants in the Plan on that date, in addition to an annuity benefit shown on the foregoing page, it is estimated that Mr. Herbert will be entitled to receive approximately 816 shares and Mr. Ross approximately 790 shares out

(Deposition of R. C. Weiderman.)

of the shares of the company's stock held by the trustee for the purpose of distribution to retiring participants under the terms of the Plan as outlined in the preceding paragraph 4(i).' [24]

"You assisted Mr. Raskopf in making that estimate?

"A. Yes, sir.

"Q. Is it not a fact that instead of receiving that amount of stock Mr. Herbert and Mr. Ross received shares of stock as shown on Exhibit 67 to the deposition of Mr. Raskopf, to-wit: 830 shares for Mr. Herbert and 803 shares for Mr. Ross?

"A. That is correct.

"Q. And is it not a fact, Mr. Weiderman, that if Mr. Dunn had been permitted to have retired on July 1, 1945, the ratio of the total contributions of Mr. Herbert to the total contributions then in the fund would have been reduced below the figures shown on Exhibit 67, to-wit: below .005534367268?

"A. It would have been changed slightly, but your question was would Mr. Dunn's retirement have changed the number of shares. That is a question I cannot answer.

"Q. If the percentage was reduced and you applied it to a constant factor of 450,000 shares, it would have been reduced, would it?

"A. Not necessarily, because that decimal would reach so far out to the right of the decimal point it may have made no difference in the number of shares. [25]

(Deposition of R. C. Weiderman.)

“Q. It would not have amounted to one-half of one share, is that your answer?

“A. We do not issue shares in halves.

“Q. I know you do not.

“A. Because the amount would be so small compared to the total.

“Q. The total contribution of Mr. Dunn was \$2,353.29? Is that correct?

“A. That is correct.

“Q. I note that in the same exhibit, No. 141, Mr. J. Ehlers is shown with contributions of \$5,629.82. Laying that one to the side, the next one is J. B. Carpenter, who had contributions of \$11,373.93, who is shown as withdrawing from the Plan on May 15, 1945. If he had been permitted to retire on July 1, 1945, would your answer still be the percentage of Herbert would not be reduced to such an extent as to affect one share?

“A. I am sorry; I did not make that statement in my testimony. I cannot answer the question.

“Q. Are you a slide rule man?

“A. No, sir. Thank you.

“Q. You have a machine, though?

“A. That is right.

“Q. That machine runs these readily, does it not? [26]

“A. Yes.

“Q. You could tell us what the effect of—let us assume this, that both Mr. Dunn and Mr. Carpenter had been permitted to retire on July 1, 1945—

(Deposition of R. C. Weiderman.)

what would the effect have been on the number of shares that Mr. Herbert would have received?

“A. My answer must be the same, because those amounts are rather small compared to the total amount and I do not know that it would have changed that decimal sufficiently to have changed the number of shares.

“Q. But it would have the effect of reducing the percentage figure somewhat, would it not?

“A. It would have the effect of reducing that decimal to a very small degree.

“Q. And that would be true of a similar situation in any year, would it not?

“A. Just what do you mean by that?

“Q. Well, where some man was 55 and he was denied retirement, any director that retired in that year would get a slightly lower percentage because his total contributions would be a lower percentage of the total contributions then in the fund if somebody else was still in the retirement fund on [27] July 1st?

“A. That would be mathematically so, but whether it would have changed the number of shares I could not say.

“Q. Directing your attention again to Exhibit 141——

“A. Which one is that?

“Q. Exhibit 141. Ehlers, it starts with——

“The Witness: That is 141.

“Q. Yes. We might as well mark it. The other one is 140.

(Deposition of R. C. Weiderman.)

"Mr. Young: That starts with Foote.

"Mr. King: 140 starts with Foote.

"Q. Directing your attention again to Exhibit 141 to your deposition, if Mr. Carpenter and Mr. Dunn had been permitted to retire on July 1, 1945, the percentage shown opposite the name of J. I. H. Herbert in this compilation marked Exhibit 67 would have been reduced as it was applied to the amount in the dividend account, would it not?

"It would be changed to the same degree as it would as far as stock was concerned."

Beginning again on Page 253 with the first question on that page, which is about the center of the page, and continuing to the end of Line 1 on Page 258:

"Q. Now, Mr. Weiderman, directing your attention [28] to Item A of the subpoena served upon you on October 30, 1951, which calls for the record showing the following information with respect to J. I. H. Herbert, a participant under the Profit-sharing Retirement Plan, his personal contribution from his compensation for the years 1939 running through the year 1945, and yesterday I believe you stated that he made none for the year 1945. Do you have the information with respect to the other years?

"A. Yes, sir.

"Q. Will you produce it, please?

"A. You will notice that the other two men are included on that same statement, Mr. King.

"Q. I will ask you further questions, then. Un-

(Deposition of R. C. Weiderman.)

der Item B of the same subpoena like information was called for with respect to Mr. W. A. Reynolds extending through the year 1947, but Mr. Reynolds made no contribution for the year 1947?

“A. Correct.

“Q. And Item C of the same subpoena calls for like information with respect to Mr. A. W. Hughes extending to the year 1951, but Mr. Hughes made no contributions for the year 1951, did he? [29]

“A. Correct. Nobody has yet.

“Q. And in response to those three items of the subpoena you have now handed me a compilation from your records setting forth the information requested under the three items, all on one sheet, is that correct?

“A. Yes, sir.

“Mr. King: I ask that the sheet produced by the witness be marked as Exhibit 159 to his deposition.

(“Sheet headed ‘Record of personal contributions’ was marked Plaintiffs’ Exhibit No. 159, Deposition of R. C. Weiderman, Cases 5965 and 6095, October 31, 1951, C. B.)

“Mr. King: Now I ask Counsel whether it will be stipulated that the figures set forth on Exhibit 159 are a correct transcript of the original records under the control of Mr. Weiderman.

“Mr. Young: It is so stipulated.

“Q. I call your attention to Item D of the same subpoena calling for the records showing the total contributions of all participants in the Profit-shar-

(Deposition of R. C. Weiderman.)

ing Plan as of each of the following dates, and the dates are as follows: July 1, 1945, July 1, [30] 1946, July 1, 1947, July 1, 1948, July 1, 1949, July 1, 1950, July 1, 1951. Have you that information?

“A. Yes.

“Mr. King: The witness has just handed me a sheet headed ‘Contributions of all participants on July 1 of each year shown.’

“Q. That means the contributions of all participants in the fund as of that date, is that correct, Mr. Weiderman? “A. Yes.

“Mr. King: Will it be stipulated by Counsel that the figures set forth on this sheet produced by the witness are a correct reflection of what is shown on the actual original records from which he compiled them?

“Mr. Young: We so stipulate.

“Q. You did compile it from the records under your supervision? “A. That is right.

“Mr. King: I ask that the sheet so produced by the witness be marked Exhibit 160 to his deposition.

(“Sheet entitled ‘Contributions of all participants on July 1 of each year [31] shown,’ was marked Plaintiffs’ Exhibit No. 160, Deposition of R. C. Weiderman, Cases 5965 and 6095, October 31, 1951, C. B.)

“Q. Mr. Weiderman, during your examination yesterday you produced a compilation headed, ‘Participants other than retirement out 1/1/45 to 7/1/49, who were 55 years of age or over.’ On that list I find as the tenth name under the heading ‘Name’

(Deposition of R. C. Weiderman.)

H. J. Johnson, who is shown as in the accounting department of the New York office. Did you know Mr. Johnson? "A. Yes.

"Q. And what was his position with the company, just an accountant or what?

"A. He was an accountant.

"Q. And I note as shown on that exhibit that he lacked about four months of attaining the age of 60 at the time that he went out of the Plan as a participant. Do you know why he was not permitted to retire?

"A. Mr. Johnson was totally disabled."

On Page 259, the fourth question, which is the beginning of the ninth line, and continuing through to Page 266, at the end of Line 16, which reads, "That is correct." [32]

"Q. Did you know Mr. G. H. Crocker?

"A. Yes, sir.

"Q. Who is also shown on the same exhibit?

"A. Yes, sir.

"Q. What was the condition of his health prior to his death?

"A. I was not that close to Mr. Crocker to be able to answer that question, Mr. King.

"Q. You do not recall whether his death was sudden or not?

"A. To my recollection, he died suddenly.

"Q. And the stock to which he would have been entitled if he had survived to age 60 remained in the Plan?

"A. All stock remains in the Plan until it is ac-

(Deposition of R. C. Weiderman.)
tually issued to retiring participants.

“Q. And the same situation would apply to the other persons listed as deceased on the same sheet, Exhibit 141, to which I have been referring?

“A. The same answer would apply, Mr. King.

“Q. Now, with respect to these statements from The Chase National Bank as Trustee which were marked on your deposition as exhibits, in each instance having four separate divisions, now [33] Exhibits 130-A, 130-B, 130-C and 130-D, and the like subdivisions of Exhibits 131, 132, 133 and 134, can you tell me from examining those on what date the loan made by the Continental Illinois National Bank & Trust Company to The Chase National Bank of the City of New York as Trustee was paid off?

“A. I believe so.

“Q. What date would it be?

“A. I have not got it here.

“Mr. Young: You may refer to the document if you wish.

“Mr. King: Certainly, I want you to refer to it.

“The Witness: I haven’t the documents here, but I can get them.

“Mr. King: I wish you would, as long as it is possible to get them, and then we can complete that.

“Mr. Young: Do you wish to delay the deposition until they arrive?

“Mr. King: Yes, it will only be a minute.

“(Short recess.)

“The Witness: Do you wish me to read off the dates, Mr. King?

(Deposition of R. C. Weiderman.)

"Q. No, I just want to know the final date when the [34] loan was paid, if you can tell me.

"A. The final date was December 27, 1941.

"Q. And do you know whether or not any of the contributions made by the participants in the Plan up to that date were used in discharging that loan?

"A. The trustee presumably used all funds received for the payment of that loan.

"Q. And sometime in 1940 you paid over to the trustee such amounts as were contributed by participants from their 1939 compensation, is that right?

"A. Yes.

"Q. And in 1941 you paid over to the trustee such amounts as were contributed by the participants from their 1940 compensation?

"A. Yes, sir.

"Q. And those amounts were used by the trustee in reduction of that loan?

"A. The trustee used all funds received for the reduction of the loan; that is correct.

"Q. In other words, your answer is that if those funds were paid over they were used by the trustee in discharge of the loan?

"A. My answer is that the trustee used all funds [35] received to pay off the loan.

"Q. I will put it in another way. The trustee received those funds prior to December 27, 1941?

"A. Yes.

"Q. He may have used those funds together with other funds in discharging the loan?

"A. He used all funds received.

(Deposition of R. C. Weiderman.)

"Q. Now, directing your attention to this Exhibit 159 headed 'Record of personal contributions' on which appear those of Mr. J. I. H. Herbert, Mr. W. A. Reynolds and Mr. A. W. Hughes, I also direct your attention to Exhibit 67 to the deposition of Mr. Raskopf and to the percentage shown in the fifth column of figures on that exhibit; I hand you the exhibit. Opposite Mr. Herbert that percentage is 00.5534367268, is that correct?

"A. That is right.

"Q. Now, as of that date can you state what the percentage of the then contributions of Mr. Hughes bore to the total contributions then in the fund?

"A. If Mr. Hughes' contributions were exactly the same as Mr. Herbert's, the percentage would be the same. I have not got Mr. Hughes' contributions unless I add these two figures. [36]

"Q. I show you again your Exhibit 159 and ask you if that does not show that the contributions of Mr. Hughes under the plan were identical with those of Mr. Herbert. "A. It does.

"Q. And therefore your answer would be that the percentage as of July 1, 1945, would be the same as that shown for Mr. Herbert on this Exhibit 67?

"A. That is correct.

"Q. Now, directing your attention to the same Exhibit 159, and to Exhibit 69 which I hand you, on Exhibit 69 is shown the percentage as applying to Mr. W. A. Reynolds who retired July 1, 1947, and that percentage is shown as 00.603672618 per cent, is that correct? "A. That is correct.

(Deposition of R. C. Weiderman.)

“Q. Now I will ask you what the per cent of the contributions then in the fund of A. W. Hughes bore to the total contributions then in the fund as of July 1, 1947.

“A. It would be identical with Mr. Reynolds’.

“Q. Now, Mr. Hughes retired as of July 2nd—
July 1st was a holiday——

“A. Yes.

“Q. And his percentage is shown on Exhibit 73, which [37] I hand you?

“A. Yes.

“Q. And that percentage as of that time of his contributions to the total contributions then in the fund was 00.612215861 per cent, is that correct?

“A. That is right.

“Q. Can you explain from what cause or reason the per cent of Mr. Hughes’ contributions then in the fund to the total contributions then in the fund increased between the date of July 1, 1945, when it was 00.5534367268 per cent to July 1, 1951, when it was 00.612215861 per cent?

“A. That is because the contributions of the participants who left the Plan were not offset by the new additions, the contributions of the new participants coming in.

“Q. Now, in Exhibit 73 it shows that Mr. Hughes upon his retirement received share of stock in the total amount of 2,755 shares, is that correct?

“A. That is correct.

“Q. But Mr. Herbert, who retired on July 1, 1945, received shares of stock which expressed in the present shares would amount to 2,490 shares?

“A. That is correct. [38]

(Deposition of R. C. Weiderman.)

"Q. So that Mr. Hughes has by virtue of the increase of his percentage received an additional 265 shares, is that correct?

"A. That is correct, and it is also true of all other participants who retired on that same date.

"Q. Well, they did not receive that many, but they received some increase, is that right?

"A. The same percentage would apply to all participants.

"Q. But the answer to my question is that Mr. Hughes did receive an additional 265 shares? I believe that is the correct figure; you might check it.

"A. That is correct."

Beginning again on Page 282, the seventh line, which begins with the words "The Witness," and continuing through the seventeenth line on Page 283, which reads, "That is correct":

"The Witness: May I have an opportunity to clarify one of my answers?

"Mr. King: Certainly, at any time.

"The Witness: You asked me a question why Mr. Hughes' percentage had changed between those two years.

"Q. That was between July 1, 1945, and July 1, 1951?

"A. That is correct. There may be another reason [39] in addition to the one I gave, and that is this, that those percentages are based on a proportion of the individual's contribution compared to the total, and that ratio might change over that period simply because Mr. Hughes may have received—or

(Deposition of R. C. Weiderman.)

may have contributed possibly a little larger percentage than other participants.

“Q. Well, the contributions are uniform for anyone who received more than \$300 a year, are they not?

“A. The percentage is, but not the amount.

“Q. That is true, but if they all contributed say 20 per cent of their compensation over that period of time and there were no withdrawals and no deaths the percentage would be constant during that period of years, would it not?

“A. That would only be true if everybody received the same amount each year, Mr. King.

“Q. Is your last statement intended to supplement your prior answer? “A. That is right.

“Q. In other words, you think the percentage increased because of certain terminations as participants in the Plan that were not offset by contributions from new participants, and also for the last reason you stated? [40]

“A. That is correct.”

On Page 285, beginning with the beginning of the third line, which is the first question on that page, through the end of the eleventh line, which is the end of the answer to the first question:

“Q. As a participant of course you knew that funds that you contributed from your 1939 compensation and also from your 1940 compensation were being used to discharge the indebtedness due from The Chase National Bank of the City of New York,

(Deposition of R. C. Weiderman.)

trustee, to the Continental Illinois National Bank & Trust Company?

"A. I knew that all receipts by The Chase National Bank were used to pay off the loan."

That completes the deposition of Mr. Weiderman.
Now the deposition of Mr. Albert W. Hughes:

Excerpts from deposition of

ALBERT W. HUGHES

Beginning on Page 320, with the beginning of the deposition on that page, and continuing through the twelfth line on Page 322, which reads, "Executive Vice-President."

"Albert W. Hughes, called as a witness, being first duly sworn, testified as follows:

"Direct Examination

"Q. (By Mr. King): State your name, please.

"A. Albert W. Hughes.

"Q. You commonly sign your name as A. W. Hughes?

"A. Yes, or Al Hughes.

"Q. Where do you reside?

"A. New Rochelle, New York.

"Q. Were you born in Missouri, Mr. Hughes?

"A. No, sir. I was born in Skaneateles, New York.

"Q. I believe you are a college graduate, Mr. Hughes.

"A. That is right.

"Q. What school?

"A. Colgate.

"Q. What year?

"A. 1911.

(Deposition of Albert W. Hughes.)

“Q. What year did you go to Moberly, Missouri?

“A. 1920.

“Q. Did you accept some employment with J. C. Penney Company there?

“A. I became a salesman trainee in the Moberly store.

“Q. How many years were you in Moberly?

“A. Two years.

“Q. Then did you assume a managership somewhere?

“A. No. I went to Eureka, Utah, as assistant manager of the store, and some six months later was made manager of that store.

“Q. How long did you remain there as manager? [42]

“A. About a year and a half, at which time I went to Athens, Georgia, and opened a new Penney store.

“Q. How long were you in Athens?

“A. Approximately a year and a half.

“Q. Then did you come to New York?

“A. Yes, sir.

“Q. And you have been here in the New York office ever since? “A. That is right.

“Q. In what year did you become head of the personnel department? “A. In the year 1937.

“Q. And you relinquished that in 1940, did you?

“A. That is right.

“Q. What position did you take up in 1940?

“A. I had been previously first vice-president and head of the personnel department from 1927 on,

(Deposition of Albert W. Hughes.)

and in 1940 I relinquished the personnel department to devote myself more to the general activities of the company, and they changed my label to executive vice-president.

“Q. In 1940? “A. 1940.

“Q. I thought in 1943 you became executive vice-president. [43]

“A. It may be the title was changed in 1943.

“Q. In 1946 you became president?

“A. Yes. I am not sure of the date about being executive vice-president.”

Beginning again on Page 334, at the top of the page, and continuing over onto Page 340 to the end of the nineteenth line, which has only in the line the word “basis”.

“Q. I direct your attention first to the minutes of the annual meeting of stockholders held March 21, 1935, Exhibit 74 to the deposition of Mr. Raskopf. Do you recall whether or not you were present at that meeting? “A. I was.

“Q. So you were familiar with the action taken there with respect to the sale of stock?

“A. I was.

“Q. And directing your attention to Exhibit 75, the minutes of the board of directors of April 30, 1935, you are shown as being present at that meeting? “A. That is correct.

“Q. And you were familiar with the action taken by the board of directors with respect to the sale of stock?

“A. I have not read this. I assume that.

(Deposition of Albert W. Hughes.)

“Q. You better read it.

“A. (After reading exhibit): Yes, sir. [44]

“Q. Did that refresh your recollection?

“A. Yes, sir.

“Q. Directing your attention to Exhibit 76, being minutes of the special meeting of stockholders held November 20, 1936, do you recall whether or not you were present at that meeting?

“A. I assume that I was, because I think I attended all stockholders' meetings for the last 15 or 18 years.

“Q. Will you examine those minutes and see whether your recollection is refreshed as to whether you were present or not?

“A. (After examining minutes): Yes, sir.

“Q. Directing your attention to Exhibit 77, being the minutes of regular meeting of the board of directors held November 24, 1936, you are shown as among those directors present.

“A. Yes.

“Q. Will you examine those minutes and state whether you recall the action taken by the board with respect to the sale of stock?

“A. (After reading): I do.

“Q. Up to and including the actions taken at those meetings, had it been the policy of J. C. Penney Company from time to time to permit managers and [45] other executives to acquire shares of stock of the company?

“A. It had.

“Q. And that had been the policy that had been looked upon with favor originally by Mr. Penney and then by Mr. Sams and finally by yourself?

(Deposition of Albert W. Hughes.)

"A. Yes, sir.

"Q. In that the policy which is referred to in Exhibit 125, being this original profit-sharing retirement plan booklet, page 22, in the second paragraph where, under the heading of 'Purpose,' it is stated:

"'It is further intended to include and continue the principle of ownership participation which has been such a powerful incentive to the management staff in all the development and operation of the company'?

"A. That is referred to, and also the original basis on which this company operated, of partnership and ownership, which is the original participation basis.

"Q. You never participated in that?

"A. I did.

"Q. When the J. C. Penney Company was a Utah corporation in the years 1917 to 1925? [46]

"A. Yes, sir.

"Q. With whom were you a partner?

"A. I was in Eureka, Utah, known as a try-out manager. When I went to Athens, Georgia, Store 570, I was a partner with Mr. Sams, who owned a third, and they took my note for a third ownership, and then there were two other partners who were in the New York office. Mr. Dahl in the accounting department was one. I am not sure of the other. I would have to check my records to be sure of that.

"And later, I would add that Mr. Sams sold one-half of his third interest to a Mr. John Weber, who

(Deposition of Albert W. Hughes.)

was the man under whom I had trained in Moberly.

“So that actually there were Mr. Sams, with a one-sixth ownership in that store; Mr. Weber, a one-sixth owner; while I was a third owner; Mr. Dahl, and another man from the New York office. I would have to check my records on that. He owned a one-sixth interest.

“Q. This man you trained with was whom?

“A. Mr. John Weber.

“Q. Did he come to the New York office, too?

“A. No, sir.

“Q. In those days it was the practice of providing [47] additional compensation for men in the New York office by permitting them to become partners in some of the outlying stores?

“A. That is correct, but it was usually done in the early days by Mr. Penney or Mr. Sams or one of the senior partners giving up their rights to purchase an interest in a new store and assigning that right to a man in the New York office to give them an ownership.

“Q. Mr. Dahl in New York, and this one named—whose name you have forgotten?

“A. I am ashamed of myself, but I cannot recall the name. I checked it once and have not checked it in five years.

“Q. The original plan was that various men in partnership owned the stores and they incorporated the business in 1925 that was abandoned, was it not?

“A. The abandonment was started then but it

(Deposition of Albert W. Hughes.)

was not actually completed, the workings out of it, for a period of years, four or five years.

"Q. You eventually sold your one-third interest in the Athens store, did you?

"A. The one-third interest I had in the Athens store was converted under the new plan in 1927 into [48] common and preferred stock of the J. C. Penney Company.

"Q. And that was true eventually of all the stores that were owned as partners?

"A. That is correct.

"Q. So that those partners wound up as owners of stock of the J. C. Penney Company?

"A. That is right.

"Q. Of the present J. C. Penney Company?

"A. That is right. Yes, I think so, because the Delaware corporation—I think that is correct, yes.

"Q. And that principle of ownership participation was a very important factor in your opinion in the development of the Penney Company over the years? "A. That is correct.

"Q. It was an objective that held the interest of the managers and of the people in executive positions in the company?

"A. That is correct. I might add, though, that I think it was not the only objective.

"Q. What other ones did you have in mind?

"A. I am thinking of the time when we developed a new plan in 1927 for compensation for the central [49] group. I am thinking also of other com-

(Deposition of Albert W. Hughes.)

pensation plans which we have which do not necessarily involve stock ownership.

“Q. Have you some general plan of accident disability and health insurance for the company employees?

“A. No. We have a J. C. Penney Company Association of Delaware which handles group insurance and permits men to buy certain types of insurance on a preferred basis because it is a group basis.”

Continuing again on Page 466, beginning with the third question which appears in the eleventh line on that page, and continuing over to the end of the sixth line on Page 468, which reads, “Answer: Yes, sir.”

“Q. When you became a participant in the Plan you realized, did you, that as stated on Page 7 of Exhibit 125 under the sub-heading B, Other Separations:

““Any cases other than retirement, including death, resignation, dismissal, physical or other incapacity, etc., will fall under this provision.”

And the provision that it refers to was that the participant would have to withdraw from the Plan.

“A. Yes, sir. [50]

“Q. In other words, that is a hazard and you and every other participant would have to accept it?

“A. Yes, sir.

“Q. And after the Plan became a formality every manager of the Penney Company either had to ac-

(Deposition of Albert W. Hughes.)

cept that hazard or immediately cease his employment. Is not that correct?

"A. Every manager on contract and every participant in the general office compensation plan had to either sign an acceptance card for the Plan or cease active continuance of the duty he had. I guess that answers your question yes. I want to be sure of my language.

"Q. That is all right. You be just as careful as you care to be, and I know you have been. He was given the option of giving up his employment or signing this acceptance blank, was he not?

"A. Yes, sir.

"Q. And if he signed this acceptance blank, then he accepted a hazard with respect to his ever acquiring stock in the event of his withdrawal for any cause other than retirement, which includes his death, resignation, his dismissal, physical or other incapacity?

"A. Yes, sir.

"Q. You as a participant were willing to accept [51] those hazards?

"A. Absolutely, yes.

"Q. And the other directors who were participants felt the same way about it?

"A. Yes, sir."

Those portions of those depositions are offered with the reservations Counsel has made for tomorrow morning.

The Court: Subject to objection, they are admitted.

Mr. Yerke: Call Mr. Jenkins.

JOHN S. JENKINS

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Where do you reside, Mr. Jenkins?

A. 3265 North Willamette Boulevard, Portland, Oregon.

Q. By whom are you employed at the present time? A. Sears, Roebuck.

Q. Have you ever been in the employment of J. C. Penney Company? A. Yes, sir.

Q. During what years?

A. Approximately, I believe, from 1926 until November of [52] 1941.

Q. Where did that employment commence?

A. La Grande, Oregon.

Q. How long were you at La Grande, at the La Grande store?

A. Five years, approximately.

Q. So that you left there approximately 1931?

A. Yes.

Q. In what capacity were you employed by that company when you left La Grande?

A. I was Assistant Manager at that time.

Q. Where did you go from La Grande, Oregon?

A. Enterprise, Oregon, as manager of the store.

Q. How long did you remain at Enterprise?

A. Approximately one year.

Q. You were manager during that entire period?

(Testimony of John S. Jenkins.)

A. Yes, sir.

Q. Where did you go after your employment ceased at Enterprise? A. Baker, Oregon.

A. In the capacity of manager?

A. Yes, sir.

Q. Did you remain at Baker until 1941?

A. November of 1941.

Q. Were you manager at Baker during that entire period? A. Yes, sir. [53]

Q. Do you recall during the year 1940, Mr. Jenkins, receiving some information concerning the profit-sharing retirement plan for the management staff of J. C. Penney Company?

Mr. Young: At this time defendants will interpose an objection to any further testimony in this case upon the same grounds as upon the motion to dismiss.

The Court: All right.

Mr. Young: May it be understood that that objection stands to each and all questions hereafter asked?

The Court: It may be so understood. Proceed.

The Witness: Well, I did receive instructions. I may answer, sir?

The Court: Oh, yes.

The Witness: I did receive instructions in regard to this plan.

Q. (By Mr. Yerke): Did you make contributions to the fund that was set up under that plan?

A. Yes, I did.

(Testimony of John S. Jenkins.)

Q. Did you make any contributions in 1940 from your 1939 compensation?

A. I am quite sure I did. I cannot answer that directly and swear that I did, but I am quite sure that I did.

Q. Then, of course, you did make a contribution in 1941? A. Yes.

Q. From your 1940 compensation? [54]

A. Yes.

Q. Did you receive a little black book outlining the details of the plan and the trust agreement?

A. Well, I did receive some information and a booklet, I remember. Of course, I cannot remember whether it was black or not. It has been a good many years ago.

Q. Do you recall what happened to that?

A. No, I do not.

(Discussion off the record.)

Q. At the time that this plan was set up and up to the time that you left the employment of J. C. Penney Company, Mr. Jenkins, had you ever been advised of any illegality in any portion of the plan or the trust agreement relating thereto?

A. No, sir.

Q. When were you first advised of any possible illegality in any portion of the plan or the trust agreement? A. Just recently.

Q. When was that? Do you mean a few days ago; a few weeks? A. Just a few days ago.

Q. Incidentally, why did you leave the employment of the J. C. Penney Company?

(Testimony of John S. Jenkins.)

A. Well, I resigned from the company because of the personalities.

Q. A personality clash? A. Yes. [55]

Q. With whom?

A. Oh, the district managers.

Mr. Yerke: Cross examine.

Cross Examination .

Q. (By Mr. Young): What was the date of your resignation?

A. It was in 1941. I can't give you the exact date or the month.

Q. Did you receive back your credits from the company at the time you left?

A. I did receive some compensation from the company.

Q. I am speaking of credits under the plan.

A. Well, the cash under the plan, yes, sir.

Q. Had it occurred to you that there was anything illegal about the plan?

A. No, not at that time. I have never been advised.

Q. You were never bothered about that, were you? A. No.

Q. And the first that you had heard of the plan being illegal began with the attorneys for Messrs. Wells and Albertsen?

A. That is the first time I had been advised that there might have been an illegality.

Q. Are you personally acquainted with either Mr. Wells or Mr. Albertsen?

(Testimony of John S. Jenkins.)

A. I had never met them before three or four days ago. [56]

Q. Who contacted you to get you to come up here to the trial?

A. One of the gentlemen of the firm called me where I am employed and asked me if I would come over and talk with them.

Q. Did they advise you the plan was illegal?

A. They advised me that they had very good information that it was.

Q. When was this that they told you?

A. I have forgotten whether it was Monday or Saturday. Saturday, I guess, last Saturday.

Q. Did you make any independent check to determine whether or not it was illegal?

A. No, sir, it was not up to me to make any check.

The Court: It would not make any difference, anyway. I am going to decide that question.

The Witness: That is correct.

Q. (By Mr. Young): Was the amount you received at the time you left the Penney Company \$783.99?

A. I cannot answer that question definitely.

Q. You do not remember the figure?

A. No, sir.

Mr. Young: That is all.

Mr. King: That is all. [57]

HARVEY L. WELLS

plaintiff, called on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Where do you live, Mr. Wells? A. Denver, Colorado.

Q. What is your present occupation?

A. I am a general agent for the state for an insurance company.

Q. You are also one of the plaintiffs in this case; are you not? A. I am, sir.

Q. You were employed at one time by the J. C. Penney Company? A. Yes.

Q. Isn't that right? A. Yes, sir.

Q. For what period; during what years?

A. Well, it was in two periods. Originally I was employed in 1919, I believe, for a few years, and then I came back with the Penney Company in 1929, I think.

Q. Your employment during that first period, was it at Everett, Washington?

A. Everett, Washington.

Q. As a trainee; was it not? [58]

A. That is right.

Q. When you commenced re-employment—when you were re-employed by the company in 1929, where did you work, what store?

A. At Store 217 in Portland.

Q. In what capacity? A. I was a floorman.

Q. How long did you remain at the Portland store, 217?

(Testimony of Harvey L. Wells.)

A. Until about, I am not certain, 1932, 1933, I think.

Q. Where did you go from there?

A. To the management of a store, Portland store, on Williams Avenue at that time.

The Court: That is Store Number 499?

The Witness: 499; that is correct.

The Court: In 1935 you were transferred to Store Number 499. It is all set out in paragraph 16 of the admitted facts.

Mr. Yerke: We will not go ahead with that examination, then, your Honor.

Q. You left the Corvallis store in 1948?

A. That is right.

Q. You resigned? A. Yes.

Q. Why?

A. Well, I had had tragedy in my family, and many things contributed to my feeling that I had best get out. I just did [59] not feel like I would do the job.

Q. Was it a question of poor health?

A. Yes.

Q. Or mental condition, or what?

A. I just — it was health with me, and it was brought on by the loss of my wife.

Q. You made contributions, of course, to the profit-sharing retirement plan back in 1939 or 1940, did you? A. Yes, for the year 1939.

Q. You made a voluntary contribution that year?

A. Yes, sir.

Q. You continued to make contributions during

(Testimony of Harvey L. Wells.)

the other years you were in the employment of the Penney Company?

A. Yes, sir. They were withheld after the first year.

Q. At the inception of the plan and until the time that you left the employment of J. C. Penney Company, were you ever advised of any illegality in any portion of the plan or the trust agreement relating thereto?

A. No, sir.

Q. When were you first advised to that effect?

A. When I consulted Mr. King about 1950 or 1951.

Mr. Yerke: Cross examine.

Cross Examination

Q. (By Mr. Young): How did you happen to consult Mr. King? [60]

A. I had learned that Mr. Burkitt was having his contract looked over to determine whether or not he had a case, and so I felt that I should have mine.

Q. You were acquainted with Mr. Burkitt?

A. Yes, sir.

Q. Is Mr. Burkitt the one that first mentioned the subject to you?

A. Well, I don't recall. We have been friends for many years and had discussed it.

Q. Is Mr. Burkitt the one that suggested you go to see Mr. King?

A. Yes, sir.

Q. At the time that you left the Penney Company, did you receive back all of your own contributions?

A. Yes, sir.

(Testimony of Harvey L. Wells.)

Q. Did you also receive the company contributions and the other credits to which you would be entitled under the plan? A. Yes, sir.

Q. What age were you when you left the Penney Company? A. I believe 1951.

Mr. Young: If the Court please, if there is any further cross examination, we reserve it, I assume, until tomorrow morning.

The Court: Yes. I was going to ask, is the issue of whether or not this is a representative action, whether Mr. [61] Wells and Mr. Albertsen represent all of the other persons who have left the employ of the company and who made original contributions, one of fact or of law?

Mr. Young: One of fact.

Mr. Yerke: I think it is one of your contentions of law; is it not?

The Court: I noticed it is the defendants' contention of law.

Mr. Stone: Yes, contention of law number six.

The Court: Contention of law number six appearing at page 78 of the pre-trial order, and it is again referred to on page 91, number 22 and 23.

Mr. Yerke: Did you have any further questions now, Mr. Young?

Mr. Young: Just one moment, please.

Mr. King: Well, the purpose of putting this testimony on, if that is what you would like to be advised, is that we have alleged in here that the plaintiff was not advised of any illegality of the plan until shortly prior to the institution of the action,

(Testimony of Harvey L. Wells.)

and Mr. Young is denying that. That is the primary purpose of these witnesses.

The Court: I did not know.

Mr. King: That is the issue that we are called upon to meet.

Mr. Young: That is what we assumed the witness was [62] confining his testimony to, your Honor.

The Court: I have not interposed any objection. I just asked you a question, Mr. Young.

Mr. King: Well, I thought that that matter might be of assistance to the Court. That is the issue that we recall.

The Court: There was no issue of fact made on the representative character of this action?

Mr. King: I do not think so.

The Court: You agree that that is a question of law as to whether or not these men represent all the other people in the plan? I do not think that it is necessary for the plaintiffs to show that they represented everybody of the class.

Mr. King: No, we have not the information and could not get it from the company as to the names of these people. I endeavored to get it from them in New York so we could communicate with them. On their motion on jurisdiction, they say they will submit the names if the Court orders them to do so, but we have not communicated with any of them except Mr. Jenkins. We located him.

Mr. Young: Counsel's statement just now is that they have not communicated with these persons whom they purport to represent. Under those cir-

(Testimony of Harvey L. Wells.)

cumstances, I take it the matter is solely a question of law, and our contentions of law so state. [63]

Mr. King: Well, the point is that we have communicated with Mr. Jenkins and we have had—there is a Mr. Mitchell who is due to arrive at two-thirty this afternoon. We have communicated with him, but we cannot communicate with people the names of whom we do not know.

Mr. Young: That, of course, is a ridiculous statement because there is machinery in this court to get the names of anyone. The point I wish to make in answering your Honor's question is that counsel has stated that they have not notified anyone with the exception of those men Jenkins and Mitchell, and I am stating to your Honor on the basis of those facts it then is simply a question of law as to whether these people represent the parties they purport to represent.

Mr. King: Well, I think in view of counsel's statement, we would like to offer, in addition to the other exhibits, we would like to offer the original complaint in this action as an exhibit also because at that time it was commenced as a class action. There has been no question raised on the subject.

Mr. Young: Well, I object to the matter being—the complaint being introduced at this time for the reason that the issues set forth in the pre-trial order displace the complaint, in any event.

Mr. Yerke: An issue of fact?

The Court: It could be admitted as an admission against [64] interest.

(Testimony of Harvey L. Wells.)

Mr. King: It is in the agreed statement of facts. I did not know he was making an issue of fact until now. I have never heard about it.

Mr. Young: We can shorten this discussion, perhaps. In the complaint it was alleged that Wells and Albertsen represented the past participants. That allegation was denied in the answer. Now, that denial has stood ever since, and it still stands in the pre-trial order.

The Court: Well, as a matter of proof, is there anything that the plaintiff has to do in order to establish the fact that this is a class action?

Mr. King: I do not see how when he alleges in his complaint and that they bring it on behalf of themselves. That is the federal forms that are supplied. They filed the original complaint in that matter. That is the way they proceeded ever since in this action. He could ask them if they ever brought it individually, if he wants to, to ask the question.

Mr. Young: Counsel speaks as though somebody other than himself brought this complaint. Mr. King is the one that brought this complaint.

Mr. King: Yes, and I am not ashamed of it.

Mr. Young: No, I know, but I am just stating a fact.

Mr. King: I claim credit for filing it.

Mr. Young: All right, all right, you claim credit for it.

Mr. King: Yes, I do.

Mr. Young: The question now is this issue as to whether or not the plaintiffs Albertsen and Wells

(Testimony of Harvey L. Wells.)

represent past participants, and I am stating to your Honor under the denial in our contentions of law set forth in the pre-trial order we raise an issue upon that point.

Mr. King: Where is your contention of fact, is what we are talking about. We know you deny it as a question of law, but where is your contention of fact? You signed this pre-trial order. Where did you raise the contention of fact on that?

Mr. Young: The question is as to whether or not these people represent past participants as a question of law, your Honor, and it is now an agreed statement in this case that the past participants were not, in fact, notified with the possible exception of this man Jenkins, and that there is another man by the name of Matthews coming in.

Mr. King: Mitchell.

Mr. Young: Mitchell, pardon me. I might ask opposing counsel whether he asked anybody to join with him in this action who did not join.

Mr. King: I can answer that I did not.

Mr. Young: If the Court please, I might call your Honor's attention to one other point. There is a stipulation in the beginning of the contentions and issues, there is this [66] stipulation: "It is agreed by all parties that the classification of the contentions and issues which follows hereafter as being contentions or issues of law or fact is intended for the convenience of the Court and parties, and such classification shall not prejudice any rights of the parties." I point to that particular

(Testimony of Harvey L. Wells.)

stipulation. If there is an argument as to whether or not a particular contention is technically one of law or of fact, the circumstance that it has been designated as one of law does not prejudice the rights of the party so designating it. It could be considered also as a contention of fact.

The Court: Anyone can make his records the way he wants.

Mr. King, if you think it is necessary to do anything else, go ahead and do it. The same is true of Mr. Young. Are you through with the cross examination, or do you want to interrogate Mr. Wells any further?

Mr. Young: No, I am through. Pardon me, if the Court please, I requested a few moments ago the privilege of recalling Mr. Wells to the stand in the morning.

The Court: All right, Mr. Wells will remain.

Mr. King: Just a minute. We might ask a few more questions, and we will let him go now.

The Court: Yes. [67]

Redirect Examination

Q. (By Mr. King): Mr. Wells, were you acquainted with me before you came to see me about this matter? A. Very well.

The Court: I am really not interested in how he happened to come to you.

Mr. King: Well, there may be some point here. It might become a question of law under the pre-trial order here.

(Testimony of Harvey L. Wells.)

Q. Mr. Wells, did you institute this action, you and Mr. Albertsen, solely for the benefit of yourselves, or for yourselves and those in a similar situation?

A. It would be for ourselves and those in a similar situation because it is the plan, but it is not us individually.

Mr. King: That is all.

Recross Examination

Q. (By Mr. Young): Mr. Wells, were you ever authorized by any other past participants in the plan to represent them in this case.

A. No, sir.

Mr. Young: That is all.

Mr. King: That is all. [68]

HARRY J. ALBERTSEN

plaintiff, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Where do you presently reside, Mr. Albertsen?

A. I live at Long Pine, Nebraska.

Q. How long have you lived there?

A. Three and a half months.

Q. Is that your permanent residence?

A. Well, I would say temporarily.

Q. You are actually a resident of California, are you not?

A. That is right.

(Testimony of Harry J. Albertsen.)

Q. Why have you been staying at Long Pine?

A. Well, I went there for my health.

Q. I believe it is a stipulated fact in the case that you left the employment of J. C. Penney Company in 1951; that is correct, isn't it, December 31, 1950?

A. December 30, 1950, although—

Q. You were actually on the job on January 2, 1951, though; were you not?

A. Yes, sir, I was.

Q. You were a manager, were you not, at the time that the profit-sharing plan was put into effect in 1940?

A. Yes, sir, I was. [69]

Q. You did not make a contribution, however, did you, out of your 1939 earnings in 1940?

A. No, sir, I did not.

Q. Did you make a contribution for each year thereafter until you ceased being employed by J. C. Penney Company?

A. Yes, sir, I did.

Q. At the inception of the profit-sharing retirement plan and until you left the employment of J. C. Penney Company, had you ever been advised of any illegality in any portion of the plan or the trust agreement?

A. No, I cannot say that I did.

Q. When were you first so advised?

A. Well, after I left the Penney Company.

Q. Could you recall when the knowledge first came to your attention?

A. Well, in the early part of 1951.

Mr. Yerke: Cross examine.

(Testimony of Harry J. Albertsen.)

Cross Examination

Q. (By Mr. Young): How did that come to your attention?

A. Well, I called Jerry Geisler of Los Angeles.

Q. You what?

A. I called Jerry Geisler.

Q. Who is he?

A. He is an attorney down in Los Angeles. [70]

Q. Oh, the criminal lawyer down in Los Angeles? A. Yes.

Q. How did you happen to call him about it?

A. I wanted to know.

Q. Had Mr. Burkitt spoken to you about it?

A. No, sir.

Q. Do you know Mr. Burkitt?

A. I know Mr. Burkitt.

Q. Had Mr. Wells spoken to you about it?

A. No, sir.

Q. You inquired on your own initiative, then?

A. Yes, sir.

Q. Were you ever authorized by anyone in the retirement plan to represent them in this particular action? A. No, sir.

Q. At the time that you left the Penney Company, did you receive all of your contributions in the plan? A. I did.

Q. Did you receive also the company's contributions and the other credits to which you were entitled? A. Yes, sir.

Mr. Young: If the Court please, we reserve

(Testimony of Harry J. Albertsen.)

the right to ask Mr. Albertsen further questions in the morning.

Mr. King: I would like to ask him a few on what has been testified on the cross examination.

Redirect Examination

Q. (By Mr. King): At or about the time that you contacted Mr. Geisler, did you receive any information with respect to the institution of an action by Mr. Burkitt? A. No, sir.

Q. Did you learn Mr. Burkitt had filed a case against the Penney Company?

A. Well, not before I——

Q. No, I say after you talked to Mr. Geisler.

A. Yes, after.

Q. How did you learn of it?

A. It came in over the air, on my radio.

Q. Did you make any effort to ascertain what attorney had represented Mr. Burkitt?

A. I did.

Q. As a result of that effort, did you contact me? A. I did, sir.

Q. Did you have an interview with me in Los Angeles? A. Yes, sir.

Q. And that was prior to the institution of this action of you and Mr. Wells? A. Yes.

Mr. King: That is all the questions I have.

Mr. Young: No further questions at this time, your Honor. [72]

The Court: All right, will you please return tomorrow morning at ten o'clock.

Mr. King: Your Honor, we have one more witness, Mr. Robert H. Mitchell, who is due to arrive here by plane this afternoon, but he is not here yet, and we wondered if we could call him tomorrow morning?

The Court: You may if you want, or we can take a recess.

Mr. King: I have a man meeting him at the airport.

Mr. Young: Why not let it go until tomorrow morning, your Honor? It is satisfactory with us.

The Court: Do you know what evidence you are going to put on?

Mr. Young: We will know about it tomorrow morning, your Honor, for sure.

The Court: Is there any witness you could put on this afternoon?

Mr. Young: No, I am not prepared to put on a witness this afternoon, your Honor. I think our testimony, if any, will be very short, and, as I view this case, it is largely a question of law.

The Court: I understand Mr. King is going to make a statement tomorrow on the basis of his statement. He is going to have some experts testify as to the reasonable value of his fees.

Mr. Young: Your Honor calls it a statement. Do I understand [73] it is not going to be under oath?

Mr. King: No, it is going to be under oath. If you want to, you can have an additional one.

Mr. Young: I just was not familiar with the term "statement."

The Court: We will recess.

(Thereupon, the trial was recessed to Thursday, June 24, at 10:00 a.m.) [74]

Morning Session

(Thursday, June 24, 1954, 10:15 a.m., trial resumed pursuant to recess.)

The Court: Mr. King, you had a statement?

Mr. Young: If the Court please, before proceeding, I would like to call the Court's attention to a circumstance in accordance with your Honor's suggestion, and you note I call it suggestion rather than order.

We, this morning, served upon Mr. King a document which consists of a list of exhibits which were offered in evidence by the plaintiffs on June 23, together with a list of those that are objected to by the defendants. We have set forth in connection with these exhibits offered by the plaintiffs the objections which we have to certain of them. In addition, as I have stated, we have submitted a list of exhibits which we offer in evidence, and we will be glad to hear from opposing counsel if there is any question with respect to those.

Furthermore, I have submitted a list of paragraphs in the pre-trial order which are objected to by the defendants. That is in accordance with the right given us in the stipulation in connection with the statement of agreed facts, and these three documents——

The Court: After you have agreed to certain facts, are you now objecting to some of them?

Mr. Young: The stipulation, your Honor will recall that [75] in respect to the statement of agreed facts, the facts as facts are agreed to, but the right was reserved to both parties to make any objections to the relevancy or materiality of any portions. That is the point, your Honor.

I would like to hand up this statement at this time to be filed with the record of the case.

Mr. King: We will check it as soon as we can, but I would like to go ahead with this phase of it.

The Court: All right. Then I will not make any ruling on the admissibility of the evidence until after I have had an opportunity to examine this list.

Mr. King: That is right.

Mr. Young: If the Court please, before Mr. King proceeds, I should like to submit a statement to the Court of our position with respect to the matter of attorney's fees.

The 14th contention of fact submitted by the plaintiffs reads as follows:

"Plaintiffs contend that 4 per cent of the value of the shares of stock of J. C. Penney Company which are found by the Court to have been acquired by the Trustee by the use of the contributions and earnings of the plaintiffs and those for whom plaintiffs prosecute this action is the reasonable value of the services of plaintiffs' attorneys in instituting and prosecuting this action." [76]

That contention is denied by the defendants.

Plaintiffs' contention of law number 11 reads as follows:

“Plaintiffs further contend that a decree should be entered herein adjudging and decreeing that the Trustee holds the shares of stock of J. C. Penney Company under a resulting trust in favor of the plaintiffs and those for whom plaintiffs prosecute this action and all other participants who did not attain retirement status in that proportion which the contributions and earnings of each such person bears to the total contributions and earnings of all such persons used in the acquisition of and payment for said shares of stock.”

That contention is denied.

And, finally, plaintiffs contend in their paragraph 13 of their contentions of law that:

“ * * * plaintiffs are entitled to a decree awarding plaintiffs compensation for the reasonable value of the services of their attorneys in the prosecution of this action, and for their costs and disbursements incurred herein, and further decreeing that the sums so awarded shall constitute a lien upon all the shares of stock found by the Court to have been acquired by the contributions and earnings of the plaintiffs and those for whom they prosecute this action.”

This contention is denied by the defendants.

Your Honor will observe that by virtue of the plaintiffs' contention of law number 11, that if the Court should decide [77] this case in favor of the plaintiffs, the relief they are seeking is that there shall be a resulting trust in favor of those individuals whom your Honor has now identified as being those participants in the plan in the years

1940 and 1941, some of whom are in the class of past participants, some of whom are in the class of present participants.

The point that we are making at this time is that the decree with respect to attorney's fees is one which calls for a lien to be imposed upon the shares of stock which would be awarded to those who are in the field of past participants, together with a resulting trust in favor of the present participants, all of whom were in the plan in 1940 and 1941. The effect of such a decree, if entered, would mean that those individuals are declared to be the owners of the stock in question. Since that is the contention which is made in this case, it is obvious that in the event that this case ever reached the stage of attorney's fees, the Court would be dealing with stock which it has determined is the stock of the participants. Under those circumstances, it is the position of both defendants in this case that we are not interested in this particular phase of the matter, that in truth and in fact the adversary controversy in respect to that subject is one between the law firm of which Mr. King is head and of the participants whom he claims are entitled to receive the stock.

The Court: Your objection will be noted. [78]

Mr. Young: And our silence hereafter during the course of this, I assume, will also be noted?

The Court: You do not have to make any further objections to the testimony.

RALPH H. KING

called, having been first duly sworn, testified as follows:

Mr. King: My name is Ralph H. King. I am a partner in the firm of King, Miller, Anderson, Nash and Yerke. I have practiced law in the City of Portland for in excess of 33 years. I have had at least 15 or more years of practice largely limited to corporate matters and transactions, reorganizations and other matters involving extensive corporate transactions.

About the first of December, 1949, I was consulted by Mr. Harvey L. Wells with respect to his rights, if any, to shares of stock held by the Trustee of the plan involved in this action. As a result of that conference, I commenced an intensive investigation, both of law and the study of retirement plans, to determine what, if any, rights Mr. Wells might have to any shares of stock.

This investigation continued from time to time throughout the year 1950 and was still in progress in the early part of 1951.

About the end of March, 1951, I received a long distance call from Mr. Harry J. Albertsen, one of the plaintiffs in this action, in which he desired a consultation with respect to his rights under the plan. As a result of that, while in Los Angeles on other business, I had a conference with Mr. Albertsen. As a result of the investigation of law and of study of retirement plans, I advised those two gentlemen that [80] their rights, if any were to be

(Testimony of Ralph H. King.)

presented, were rights in common to both and that they should be presented, if at all presented, as an act in their own behalf and on behalf of others who were similarly situated, and they both consented to institute an action upon that basis. As a result of that, the present action was commenced on July 11, 1951, and has been pending in this court since that date.

It soon became apparent that it would be necessary to obtain various information for this case from the files of the company and that that could only be done by depositions taken under the provisions of the Federal Rules of Civil Procedure and preparations were made and such depositions were taken in the City of New York, commencing on the 29th day of October, 1951, and extending through the 7th day of November, 1951.

In order to arrange for the numerous subpoenas duces tecum which were required to require the production of records, it was necessary to be in New York at least a week prior to the commencement of depositions, and it was necessary to make quite a lot of preparations and arrangements for the taking of such depositions and the proper examination of witnesses thereat.

Following that, the defendants took depositions over five or six days in the month of March, 1952.

This case has required a number of routine appearances in court from time to time with respect to reporting the progress [80a] in the case. We had one day's argument on the question of juris-

(Testimony of Ralph H. King.)

diction, and it is expected that in addition to the work performed up to the time of the commencement of this trial, approximately one month's work will be required in preparing and submitting briefs to the trial court.

Up to the time of the commencement of this trial, I myself had devoted 620 hours to this case. Mr. Borden Wood, a then partner in the firm, devoted 3 hours and 35 minutes, Mr. Grant Anderson, a partner in the firm, 86 hours and 10 minutes; Mr. Frank Nash, a partner in the firm, 6 hours and 30 minutes; Mr. Fredric Yerke, a partner in the firm, 165 hours. In addition to that, services of associates were devoted to the preparation of law and other matters as follows: Mr. Norman J. Wiener, 15 minutes; Mr. John W. Hill, 1 hour and 25 minutes; Mr. Curtis W. Cutsforth, 106 hours and 20 minutes; Mr. George H. Brustad, 1 hour and 50 minutes; Mr. Eric R. Haessler, 178 hours and 35 minutes; Mr. H. F. Althaus, 6 hours and 20 minutes; Mr. Paul R. Meyer, 160 hours; Mr. Gerald J. Norville, a former associate, 16 hours; Mr. Ferris F. Boothe, a former associate, 33 hours and 20 minutes; Mr. David P. Templeton, a former associate, 116 hours and 30 minutes.

I want to say in addition to that, that in order to prepare the complaint in this case, it required a very intensive study of the law of trusts, the law of pension plans, review of all known and obtainable pension plans, and the application of [81] the rules of lotteries as established with various types

(Testimony of Ralph H. King.)

of commercial arrangements, and then applying those rules to the present situation.

I think that covers in general the type and character of services. I take it there is no cross examination, Mr. Young?

The Court: Do you want to state what in your opinion would be a reasonable fee to be allowed?

Mr. King: It is impossible to determine exactly the amount of stock. In other words, we are making no claim except with respect to the shares of stock that are obtained for plaintiffs and those for whom they prosecute the action, namely, the former participants in the plan who were in the plan in the years 1940 and 1941 and who never attained a retirement status.

As near as I can compute it, and assuming that the amount as approximately recovered is \$16,000,000, it was my opinion four per cent of that sum was a reasonable amount.

The Court: \$640,000?

Mr. King: Yes, sir, and in so stating that, I want to say that the fee in this character of a case is essentially contingent in character, and I want to say in addition that I have not the exact figures available, but the disbursements up to the present date are somewhere between three and four thousand dollars.

The Court: You say the amount involved would be sixteen [82] million dollars?

Mr. King: I say that is the only estimate I can make. They have never declared the figures, but

(Testimony of Ralph H. King.)

I may say if the amount was less than that, I would ask four per cent. If it turned out to be twelve million, it would only be \$480,000. I do not want the six hundred forty thousand unless the recovery is sixteen million or more.

The Court: I understand there was 200,000 shares, a three for one split, and that would mean around 600,000, I think, selling on the market at eighty-seven, so it would be over \$50,000,000.

Mr. King: Well, I know, your Honor, but there is a portion of all the participants we do not represent, and I assume that is about half, and I have made no claim. Instead of using the present market, I have a figure at the time they got the stock annuity. It might not be eighty-seven, a figure **which** would be below. For those we do not represent, it would be over half of them, we are making no claim on that and make no lien upon their shares although they finally benefit from the litigation.

The Court: Any further questions?

Mr. Young: No.

The Court: That is all. [83]

NICHOLAS JAUREGUY

called, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. King): Mr. Jaureguy, you are engaged in the practice in the City of Portland?

A. Yes, I am.

(Testimony of Nicholas Jaureguy.)

The Court: Mr. Jaureguy's qualifications are not in doubt, are they, Mr. Young?

Mr. Young: I have no objection, your Honor, but I am not participating in this part of the proceeding.

Mr. King: He says, your Honor, that he will not have anything to do with it, and I would not ask the questions otherwise.

The Court: Then am I supposed to represent the participants of the plan?

(Discussion off the record.)

Mr. Young: As far as I know, they are not represented, your Honor. I suspect they are not represented.

The Court: I will handle that myself.

Mr. King: Q. Just briefly, you have been engaged in the practice here over thirty years, I take it? A. That is correct; yes, sir.

Q. And you are presently a member of what firm? A. Cake, Jaureguy and Hardy. [84]

Q. Have you had occasion to examine the pre-trial order and the pleadings in the present action?

A. Yes.

Q. Have you heard the statement of Mr. King while he was on the stand? A. That is right.

Q. Have you been able to form any opinion as to what sum should be awarded for the service of the plaintiffs' attorneys in the present action?

A. Before expressing an opinion, I would like to discuss one point that I think is involved, but I am not sure. I think it has some bearing on it, and

(Testimony of Nicholas Jaureguy.)

inasmuch as there is nobody appearing on the other side, I would like to explore that matter.

That is, as I view this case, there are two contingencies, well, three. One is that you will not get anything. I do not discuss that.

Q. We are conscious of that.

Mr. Young: We would agree to put that contingency in the statement of agreed facts, your Honor.

The Witness: Then, of course, there are two problems in this case that, while I am not an expert on either and I have had no experience at all on one and very little on the other, two very perplexing problems that might result in either one or another type of decree.

One is that the Court may find that you are correct in [85] your contentions with respect to a type of annuity and retirement provisions, that it is a lottery and things of that kind, and, therefore, that you are entitled to recover. He may hold against you on the class action feature of it, and in that case I am assuming for purposes of my testimony that you will get some fees and get a fee from the named plaintiffs who recover in this case, and then the other contingency is that the Court will find for you on both points, and in that case, that is the fee that I am testifying about because the other one is not before the Court; nevertheless, I think it is something that should be considered.

Mr. King: I want, if I may interrupt, to make a statement in that case. I have no contract with the plaintiffs to that effect, that there shall be a fee.

(Testimony of Nicholas Jaureguy.)

There is no contractual arrangement of any character. I want to make that a part of my statement.

The Witness: Well, I am assuming also there is no contractual arrangement to the contrary that you will not be paid by them if you recover. In other words, there is no contract.

Q. There is just no contract.

A. I dislike to argue with an attorney that calls me as a witness, but I just want the Court to understand that I am going on the assumption the Court takes that into consideration. With that understanding, with that background, based on your testimony and a study of the pre-trial order, I would say [86] that if the Court finds in favor of the plaintiffs in this case on the basis—and that you recover for the unnamed plaintiffs, those that are members of the class as well as the named plaintiffs, I would say that if the total amount involved is ten million dollars, I would fix a fee—or I would testify that, in my opinion, a reasonable fee would be \$200,000 plus one per cent of the amount involved in excess of ten million dollars.

Mr. King: No further questions.

Th Court: I see that Mr. Manley Strayer, Mr. Walter Evans, and Mr. Moe Tonkon are in the courtroom. I think the record should show that instead of having to qualify each of the attorneys, they are well-known, capable lawyers who have had a great deal of experience, and they are among the distinguished members of this bar.

Mr. King: Thank you, Mr. Jaureguy.
I will call Mr. Manley Strayer. [87]

MANLEY B. STRAYER

called, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. King): Mr. Strayer, have you had an opportunity to examine the pre-trial order and the pleadings in this action? A. Yes, I have.

Q. You have heard the testimony of Mr. King while on the stand? A. I did.

Q. What, in your opinion, would be a reasonable sum to be allowed for the services of attorneys for plaintiffs in the present action in the event that they prevailed on behalf of all members of the class?

A. Like Mr. Jaureguy, I make the assumption that recovery is allowed in approximately sixteen million dollars and that the attorney fee is to be spread over the fund that is recovered, and on that assumption it is my opinion that a reasonable fee would be two per cent of the amount recovered.

Mr. King: Thank you very much. [88]

MOE M. TONKON

called, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. King): Mr. Tonkon, have you had an opportunity to examine the pre-trial order and the pleadings in this action? A. I have.

(Testimony of Moe M. Tonkon.)

Q. Did you hear the statement of Mr. King with respect to the nature and character of the services?

A. I have.

Q. Assuming that the plaintiffs prevail in behalf of themselves and the other members of the class, what, in your opinion, would be a reasonable sum to be allowed by the Court for their services as plaintiffs' attorneys in this action?

A. I think the amount prayed for in the plaintiffs' complaint by the plaintiffs themselves is reasonable; in other words, four per cent of the recovery made.

Mr. King: Thank you very much. [89]

WALTER H. EVANS, JR.

called, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. King): Mr. Evans, have you had an opportunity to examine the pre-trial order and the pleadings in this action?

A. I have before, and I examined them briefly.

Q. You have heard the statement of Mr. King with respect to the nature and character of the services?

A. I have.

Q. Assuming that the plaintiffs prevail on behalf of themselves and of other members of the class which they represent in this action, what, in your opinion, would be the reasonable fee to be allowed for the plaintiffs for the service of their attorneys in this action?

A. In my opinion, the only—I should not say

(Testimony of Walter H. Evans, Jr.)

the only—the fairest way to fix the fee in a class suit such as this is on a percentage basis. In my opinion, a reasonable attorney's fee to be allowed successful counsel in a class suit of this nature would be in the range from five to ten per cent of the amount of recovery. If I had to pinpoint, I would take the middle figure, seven and a half per cent. I think the precise percentage figure depends upon the difficulty of the case, the questions of law involved, the amount of the recovery, the likelihood of appeal. I am basing that on the assumption that you [90] meant exactly what you said when you said you had no contract with the named plaintiffs for your compensation except probably by contingent; that you may be able and probably will recover your actual out-of-pocket expenses from the named plaintiffs.

Mr. King: Thank you very much. [91]

ROBERT H. MITCHELL

a witness produced in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Your name is Robert H. Mitchell? A. That is right.

Q. Where do you live, Mr. Mitchell?

A. At Glendale, California.

Q. By whom are you presently employed?

A. By Menasco Manufacturing Company, Burbank, California.

(Testimony of Robert H. Mitchell.)

Q. Have you ever been employed by J. C. Penney Company? A. I have.

Q. For what period?

A. From the first of September, 1923, until the last of January, 1947.

Q. When did you first become a manager of a J. C. Penney store?

A. Approximately January 15, 1929.

Q. What store was that?

A. That was at Calexico, California.

Q. How long did you remain at Calexico?

A. Until May 30, 1933.

Q. When you left Calexico, were you still manager of that store? A. Yes. [92]

Q. Where did you go from there?

A. Redlands, California.

Q. You were manager? A. Yes.

Q. How long did you remain at Redlands?

A. Until January 31, 1940.

Q. Were you a manager of the Redlands store at the time you left Redlands? A. I was.

Q. Where did you go from Redlands?

A. Flagstaff, Arizona.

Q. Did you go as manager? A. I did.

Q. How long did you remain at Flagstaff?

A. For seven full years, January 31, 1947.

Q. That is when you left the employment of J. C. Penney Company; is that right? A. I did.

Q. Why did you leave the employment of that company?

A. I had asked for a transfer because of the

(Testimony of Robert H. Mitchell.)

health of my wife and son who could not stand the seven thousand altitude there, and I received a letter from the Personnel Department of the J. C. Penney Company that because of my past record and the fact that I had not beaten my 1942 volume in the year of 1946, that I was not entitled to a [93] transfer.

Q. And you subsequently resigned?

A. The letter stated that if I really thought I should leave Flagstaff, that it would be best for me to resign, and I resigned.

Q. You were a J. C. Penney manager, then, during the year 1940? A. I was.

Q. Do you remember the inception of the profit-sharing retirement plan of the J. C. Penney Company? A. Yes, I do.

Q. Did you make a contribution in 1940 to that plan out of your 1939 earnings?

A. The one that was not mandatory?

Q. That is right.

A. I did.

Q. Did you continue to make contributions, then, for each year thereafter until the time you left the employment of J. C. Penney Company?

A. I did.

Q. At the time that you first contributed to the fund that was set up under the plan and trust agreement until the time that you left the employment of the J. C. Penney Company, were you ever advised by anyone of any illegality in any portion of the plan or trust agreement relating thereto?

(Testimony of Robert H. Mitchell.)

A. No.

Q. When did you first learn of such illegality?

A. In the summer of 1941 in talking with my friend, Mr. Albertsen.

Q. Do you mean 1941 or 1951?

A. Of 1951; I am sorry.

Q. 1951?

A. 1951, talking with my friend, Mr. Albertsen, he informed me that a suit had been instituted attacking the profit-sharing plan of J. C. Penney Company in regard to the stock part of that plan, that it was illegal and constituted a lottery.

Q. That was the first information you had received on the subject? A. The very first.

Mr. Yerke: That is all.

Cross Examination

Q. (By Mr. Young): At the time you left Penney Company, did you receive all of the credits that you were entitled to under the plan?

A. As far as the cash is concerned, I did.

Q. You left the company before reaching retirement age; did you not?

A. About eight years before.

Mr. King: Just a minute, I do not understand what is retirement age. Did you mean 60 years retirement age?

Mr. Young: Q. How old were you at the time you left the Company? [95]

A. I was not quite 52.

Mr. King: That is what I wanted to find out. I did not know how old you were.

Mr. Young: That is all.

Mr. King: That is all.

Your Honor, if we could have a few minutes we could go over these exhibits, and I think that is our case. We would like to check them.

The Court: We will take a recess.

(Recess taken.)

Mr. King: If your Honor please, in view of the objections served on us by counsel just before court took up this morning, we withdraw from our list of exhibits Exhibit 23 and Exhibits 159 and 160, but we would like to add to our list of exhibits 319 and 320. 318 is the complaint in this case, and 319 is the answer of one defendant, and 320 is the answer of the other, which were going to be offered by the other side anyway.

Mr. Young: There is no objection to 319 and 320, your Honor.

The Court: Then the only exhibits to which you object are 140 and 141; is that right, now?

Mr. Young: That is right.

The Court: And 208-A through D and 222-A through D and 329 through 334?

Mr. Young: That is right, your Honor.

The Court: All of the other exhibits listed on page 1 of Mr. Young's [96] statement and the first 7 exhibits listed on page 2 are admitted, and the other exhibits offered by plaintiff are admitted provisionally.

Mr. King: Thank you, your Honor.

The Court: Now, with reference to the exhibits of defendant to which——

Mr. King: We will make a statement on that as soon as they offer them, your Honor, but I thought you wanted to know whether we rest or not.

The Court: Plaintiffs rest.

Mr. King: They made some kind of a reservation about our depositions, and I would like to have that cleared up, and then we are ready to rest.

The Court: The portions of the exhibits read into evidence are admitted.

Mr. King: The plaintiff rests.

The Court: Mr. Young, do you now want to offer the exhibits listed in the statement you presented this morning?

Mr. Young: Yes, your Honor, in fact, the statement itself makes the offer.

Mr. King: Very well, your Honor, we will say that we have no objections except for the ones I am about to mention, which are objected to on the grounds that they are irrelevant and immaterial. Number 12, number 128, the same objection that counsel made to some of ours. It is set forth [97] in extenso on page three and a half in the pre-trial order. There would seem to be no purpose in putting it into the record again.

Mr. Young: Pardon me, your Honor. We are willing to withdraw Exhibit 128.

Mr. King: Thank you.

I proceed down the list of exhibits to 174 and 175. Those are letters of Mr. Burkitt, and we ob-

ject to them as being only irrelevant and immaterial in the present action.

Mr. Young: Well, they are the letters showing why Mr. Burkitt left the company, and for that reason we regard them as material.

The Court: It may be material in the Burkitt case, but how would it be material in this case? I am leaving it up to you, as you know. If you want to keep them there, I will let them in provisionally.

Mr. Young: Yes, I understand. If the Court please, Mr. Burkitt, although he has brought a separate action which was tried previously, happens to be a person who falls within the classification of parties on whose behalf the plaintiffs purport to act.

Mr. King: Well, that is admitted provisionally, then, your Honor.

The Court: Yes, it will be. That is what my ruling is going to be.

Mr. King: We have Exhibits 194 thru 204 which are a similar [98] correspondence of plaintiff Albertsen as to the settlement of his accounts and why he left the company. It was immaterial also. I mean, that is not an issue in this case. He stated on the stand he got all the settlement he is entitled to other than the stock, so I do not see how that adds anything to it.

The Court: Do you want to withdraw that, Mr. Young, or do you want to keep that in?

Mr. Young: When Mr. Albertsen was on the witness stand and was examined by Mr. King, he testified to a separation, and, therefore, we would

like to have the correspondence dealing with that subject in the case.

The Court: All right.

Mr. King: Well, it is set forth in the pre-trial order, too, that he was discharged.

The Court: I do not think that an appeal will require the printing of all these exhibits. If the losing party desires, I will enter an order permitting the mailing of all exhibits to the clerk without having to print them.

Mr. King: That was one of the things I had in mind.

The Court: Well, I appreciate that.

Mr. King: All right, thank you.

The Court: But I would not require that. There are too many exhibits here.

Mr. King: We make the same comment and objection with respect to 205 and 215-A through H; the Wells [99] correspondence, 233 thru 243. They are matters pertaining to the settlement of accounts and also further correspondence with Wells, 245 through 254-H. Burkitt has a letter, Exhibit 260, and this pamphlet relating to annuities, 280 and 282-A through J, they are just statements of account. They are all between Albertsen and Wells. I mean, there is no issue in the case. In fact, it is stated in the pre-trial order.

Those are our objections to that.

Now, 303 relates to Burkitt, the summons and complaint in the Burkitt case, and 304 and 305 are the answers of the two defendants.

Mr. Young: I have stated our position in regard to those, your Honor.

Mr. King: 309 is a group of annuity contracts with insurance companies. There is no issue about them in this case. I think they are immaterial.

Now, we come down to 313 and 315, the statements about benefits paid or something. They are not in issue here also.

We come to 317. It is Albertsen's record of payments into the fund which is set out in the pre-trial order, about paragraph 52 or 57—72, or something like that.

323 is various stipulations. It is covered in the pre-trial order also. 324 is the same thing. In other words, those are incorporated, and the point I had in mind is I do not regard them as injurious, but it just clutters up the record. [100]

The Court: Mr. King, I agree with much of what you have said, and I agree with much of what Mr. Young said with reference to relevancy of some of the exhibits which you have offered, but I have permitted each of you to determine what exhibits you want to offer, and I am going to admit all of the exhibits offered by Mr. Young to which no objections have been made, and the other exhibits you offered to which there have been objections I am going to admit provisionally.

Mr. King: I want to say I think, your Honor, that the matter of transmitting them to the Court will cover most of what I had in mind, and I thank your Honor for the statement.

Mr. Young: There will be no trouble about

transmittal to the Court of any documents, I assure your Honor.

The Court: Mr. King was concerned about the possibility of having to print each of the exhibits.

Mr. Young: Yes, I understand.

The Court: That would be a very costly procedure.

Mr. King: That is right, and some of these are tremendous documents and I would hate to have to take whole volumes and print them.

Mr. Young: Yes.

The Court: Mr. Young, do you desire to offer any live witnesses?

Mr. Young: Yes, your Honor.

The Court: Proceed. [101]

Mr. Young: Before proceeding to offer the live witnesses, however, I wish to move the Court at this time for an order dismissing this proceeding upon the same grounds that were assigned at the opening of the case.

The Court: I will take it under advisement.

Mr. Young: I call your Honor's attention to the fact that in the document that was served upon opposing counsel this morning, the last page of which sets forth the paragraphs in the pre-trial order which were objected to by the defendants, your Honor did not comment upon that matter.

The Court: I did not see them. I will take that one under advisement.

Mr. Young: Very well, your Honor. Shall I proceed now?

The Court: Yes. I wondered if there should be

some record here of that. Is there any objection if the document prepared by Mr. Young this morning is admitted in evidence, any objection to the admission of that statement into evidence?

Mr. Young: I requested that it be filed with the records of the case, your Honor.

Mr. King: It is the third sheet of the document referred to?

Mr. Young: It is the last sheet.

Mr. King: Yes, I have no objection to it being marked for purposes of identification so we will know what we are talking about. The next number is 335.

The Court: Mark it 335. It is admitted as [102] showing the action of the parties.

(Document referred to marked Defendants' Exhibit 335 and received in evidence.)

Mr. Young: If the Court please, plaintiff's counsel offered in the record a portion of the Weiderman deposition found at page 257 and running over through the first line on page 258. At this time I would like to ask that there be added to the portion which counsel asked to have made part of the record, the balance of page 258 of the Weiderman deposition.

Mr. King: There is no objection.

The Court: It may be admitted.

Mr. Young: At this time I ask that there be considered as being placed in the record of this case that portion of Mr. Hughes' deposition in the Burkitt case found at page 281 commencing with the word "Mr. Young" and continuing over through

the end of the first paragraph on page 283. That has to do——

Mr. King: Wait a minute. I have already put in part of it. I have already got in the record——

Mr. Young: The deposition I am speaking of is the deposition—I am sorry, it is the transcript of the Burkitt case. I misstated that. It is not the deposition; it is the transcript in the Burkitt case.

Mr. King: Well, I object to that transcript [103] in the Burkitt case.

Mr. Young: I am only asking that it be done to save the necessity of putting Mr. Hughes on the witness stand to testify to the same facts that appear there.

Mr. King: I will have to examine it. He had me over in the deposition. Now, I will have to look at it.

The Court: 281, to what portion, Mr. Young?

Mr. Young: Commencing with the name “Mr. Young”.

Mr. King: I think Mr. Hughes should be called as a witness in this case.

The Court: How many pages of testimony?

Mr. King: Well, I want to see what it is, if I may.

Mr. Young: That has to do with the question as to what was an inducement for men to stay on with the Penney Company.

Mr. King: Where does it end?

Mr. Young: It begins on page 281 and ends on page 283.

Mr. King: We have no objection to that.

The Court: It may be admitted.

Mr. King: For the sake of saving time; that is all.

TESTIMONY OF MR. HUGHES

Mr. Young: Q. To what extent in relation to other possible factors did you consider that the plan itself was an inducement for men to stay on?

A. Of course, we did not consider that that would be the determining factor in a man because there are so many other reasons why men came into the Penney Company and why men have stayed with the Penney Company when we had no retirement plan whatever, and I could go on at great length on that.

Q. Would you just briefly indicate to the Court what factors in your observation caused men to continue in the employ of the company apart from the question of the plan.

A. Well, the first thing I think—I think I made this statement many times to investment men—the mainspring of the Penney Company throughout the years has been profit-sharing. I think that attracts and holds men to the Penney Company, with that liberal profit-sharing which a man has in the store, the advantage a store manager or associate has in the store. That is probably the selfish motive, but it is the basis of our company's growth. Coupled with that is the opportunity for a man to have a large measure of responsibility, to paddle his own canoe, because as a manager of a Penney store, while he cannot control everything, he does have a

(Testimony of Mr. Hughes)

larger measure of freedom than even an average independent retail merchant. He has that because he has no worries about finances in the Penney Company. He does not have to worry [104-A] about being out of a job and of being able to pay his bills. He has it because of the assistance given by a big corps of trained buyers, assistance given by skilled men, assistance of a skilled sales department, of a real advertising department, real estate department, and all the others. A man has an opportunity to grow and go places. When Mr. Penney hired Mr. Sams, he said, "You can go as far as your own rope will take you, as far as your rope, you can have all of the rope you want." This was the policy of the Penney Company. That is very attractive to a man who is ambitious and wants to go places. He has an opportunity to go. There is another factor which I prize very highly, and I think many, many men in the Penney Company prize, and that is the fact that we feel that to be an associate of Penney Company is almost a badge of honor. That may sound like baloney, but the standards this company has set and the pride we have in it is certainly an inducement to a man to stay with the company. There are provisions like liberal sick leave, paid vacations, free death benefits, group insurance, and all those things, but to me the real inducement to a man to come with the Penney Company or to continue with the Penney Company was the first ones I enumerated, liberal profit-sharing, the opportunity to be on his own, to do a job on his own with

a minimum of supervision, and the opportunity to go just as far as his ability will take him. [104B]

Mr. Young: Call Mr. Talbot.

JOHN C. TALBOT

a witness produced in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Mr. Young: If the Court please, this witness was called in the Burkitt case, and if there is no objection, I might just briefly state some of the preliminary matters without having to ask the questions.

Mr. King: I am not going to combine the two records in this case. You have insisted all along that they be kept separate; forget about it. I will proceed.

Mr. King: I will try to.

Direct Examination

Q. (By Mr. Young): State your name, please.

A. John C. Talbot.

Q. Where do you live?

A. St. Louis, Missouri.

Q. What is your present occupation?

A. Special Assistant to the Chancellor of Washington University.

Q. What was your occupation prior to that?

A. I was with the J. C. Penney Company.

Q. How long were you with the J. C. Penney Company?

A. From June of 1929 until late July of 1947.

(Testimony of John C. Talbot.)

Q. In what capacity were you with that company?

A. I was head of the Shoe Department that supplied shoe [105] requirements of all the stores.

Q. Were you a participant under the retirement plan which is the subject matter of this litigation?

A. Yes, sir.

Q. During what period of time were you such a participant?

A. I started at the beginning in 1940.

Q. You remained a participant until you left the company?

A. Yes, sir.

Q. Is that correct?

A. Yes.

Q. At what age did you leave the company?

A. In my 56th year, sir.

Q. Mr. Talbot, have you ever authorized Mr. Wells, one of the plaintiffs in this case, to bring this action on your behalf?

A. No, sir.

Q. Have you ever authorized Mr. Albertsen to bring this action on your behalf?

A. No, sir.

Q. Have you ever authorized the King law firm to bring this action on your behalf?

A. No, sir.

Q. Do you consider that since they are taking the position that they represent past participants that they have any authority to represent you?

A. Definitely not, sir. [106]

Q. Do you want them to represent you in this case?

A. I do not, sir.

Mr. Young: You may cross examine.

(Testimony of John C. Talbot.)

Cross Examination

Q. (By Mr. King): Mr. Talbot, if it should be determined as a result of this action that, as shown in Exhibit 332, you would become entitled to approximately 1692 shares, do you now disclaim any right to receive those shares?

A. Absolutely and completely, yes.

Mr. King: That is all.

Mr. Young: That is all.

ORA ESTLE CAMPBELL

a witness produced in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Young): Mr. Campbell, where do you live? A. Greenfield, Indiana.

Q. What is your occupation? A. Farmer.

Q. How long have you been a farmer?

A. 1948.

Q. Prior to the time that you became a farmer, what was your occupation?

A. Connected with the J. C. Penney Company.

Q. When did you first come with the Penney Company? A. May 1, 1921.

Q. When did you leave the Penney Company?

A. December 31, 1947.

Q. At the time you left the company, the Penney Company, were you a manager?

A. I was, sir.

Q. Where? A. Indianapolis, Indiana.

(Testimony of Ora Estle Campbell.)

Q. How long had you been in managerial capacity prior to the time you left the company? [108]

A. From 1924 until 1947.

Q. Were you a participant under the Penney retirement plan? A. I was, sir.

Q. At what age did you leave the company?

A. 55.

Q. Mr. Campbell, have you ever authorized Mr. Wells, one of the plaintiffs in this case, to bring this action on your behalf? A. I have not.

Q. Have you ever authorized Mr. Albertsen, one of the plaintiffs in this case, to bring this action on your behalf? A. I have not.

Q. Have you ever authorized the law firm of King, et cetera, to represent you in this case?

A. Definitely not.

Q. The plaintiffs in this case contend that they represent all past participants, and because of that circumstance do you recognize them having any authority to represent you? A. They do not.

Mr. King: I will object to that question as argumentative.

The Court: Objection overruled.

Mr. Young: Q. Do you want them to represent you in this case? A. I do not.

Mr. Young: That is all. [109]

Cross Examination

Q. (By Mr. King): Mr. Campbell, at the time you left the Penney Company did you have any shares of stock in the company?

(Testimony of Albert W. Hughes.)

Mr. King: Just a minute, please. And that it is improper for this witness to attempt to vary the terms of the plan by oral testimony.

Mr. Young: If the Court please, there is no attempt being made to vary the terms of this plan by oral testimony.

This is a situation in which the charge is being made that this plan was a lottery. The lottery is said to inhere in the fact that a person who received stock would have to be a person who lives to the age of sixty and was still a central or branch office executive or a manager. One of the factors involved in the question as to whether it is a lottery is what was the purpose of the provision itself. If the provision [112] was put in there as a sound matter of business judgment for the purpose of establishing a particular retirement plan for protection of the participants in the plan and to foster the interests of the company and the participants, that is a circumstance in respect of which the Court should be advised. I am offering this witness in respect to that subject matter.

The Court: Mr. Young, as I read the pre-trial order and particularly your contentions, you deny that the documents are ambiguous in any way. No testimony has been adduced by the plaintiffs to show any ambiguity. You have always contended that the documents speak for themselves, and I just do not understand the relevancy of any extrinsic evidence in view of your former contentions.

Mr. Young: Counsel's objection to this testimony

(Testimony of Albert W. Hughes.)

was predicated upon the assumption that we attempted to vary the terms of the plan. That is not true. I am simply indicating to the Court that this was a plan which was set up on the basis of a sound business judgment, and that by reason of this circumstance it does not have any inherent characteristics of a lottery, which is the charge made.

The Court: Cannot one determine that from an examination of the documents themselves?

Mr. Young: I think it can be determined from that, but it seems to me that we should have the right to offer oral testimony to supplement the documents. [113]

The Court: Is it your contention that that which may be a lottery under certain circumstances is not a lottery if it was done in good faith for a valid business purpose?

Mr. Young: That is a factor; yes, your Honor.

The Court: Do you have any authority to support you on that?

Mr. Young: We have a great deal of authority to support us on that.

The Court: I might say that over a period of time I have belonged to that school of legal thinking that believes that what is good business practice should be good business law except in unusual circumstances, and I am therefore going to overrule the objections and permit the witness to testify provisionally, at least. I am going to listen to the evidence, but I would like to have some authority presented to substantiate my legal thinking.

(Testimony of Albert W. Hughes.)

Mr. Young: If the Court please, that is a matter which will appear in our briefs. Unfortunately, we have been under such terrific pressure in connection with these cases the briefs are not ready to be submitted to your Honor, but in the time agreed upon yesterday, there will be ample authority submitted to support that contention.

The Court: Mr. King?

Mr. King: Of course, I can see the contention, but the contention was never included in this pre-trial order and it [114] takes us by surprise here that they are making that contention. There was never anything advanced in the pre-trial order along this line, nothing in the contentions of law nor in the contentions of fact, and I understood that when you made and prepared a pre-trial order, that plaintiffs were entitled to rely on it. Now they come in here with a new contention that we do not know anything about, and if Mr. Young will point out to me where that contention is in the pre-trial order, why, that would help out in the situation.

Mr. Young: I call the Court's attention to defendants' contention of law number one.

The Court: What page?

Mr. Stone: Page 77.

Mr. King: That does not notify us of any such contention he is now making.

Mr. Young: "Defendants contend that the Plan and Trust Agreement with respect to the 200,000 shares of J. C. Penney Company stock are valid

(Testimony of Albert W. Hughes.)

under the laws of the State of New York in all respects.”

The Court: That does not cover that.

Mr. Young: Some of the cases which will be cited are New York cases, your Honor.

The Court: In any event, I am going to listen to the testimony because, as I announced at the beginning of the Burkitt case, in view of the fact that I have not had an opportunity [115] to study the authorities upon which both parties will rely, I have to depend upon the attorneys to make their own case, and that is what I am going to do.

Mr. King: I have no objection to that, your Honor, but in view of your Honor’s statement, might I conclude the objection that it is immaterial under any issues of fact or law in the present action, so that that may be a part of the objection?

The Court: Yes.

Mr. King: And may the objection go to the whole line without repeating the objection?

The Court. Yes.

Mr. Young: Q. Would you read that last question?

(Previous question read: “Do you know the reason why there was included in the profit-sharing retirement plan the provisions for stock being issued to participants who lived on to retirement age?”)

Q. What was your answer to that question?

Mr. King: He did not answer?

(Testimony of Albert W. Hughes.)

Mr. Young: Q. What is your answer to the question? I mean, do you know the answer?

The Witness: Yes, to answer that question, Mr. Young, if your Honor will permit, I will have to cover a little more ground than that.

The Court: Go right ahead.

Mr. Young: Very well, proceed. [116]

The Witness: The board of directors of the Penney Company in having this plan prepared or sharing in its preparation and in adopting it, had two distinct features in mind, maybe more than that, but these two features.

One was the monetary credits and their investment, and the second was the stock that was to go only to participants upon qualifying for retirement.

We had spent a lot of time in trying to develop a plan that we felt was desirable for our organization. We had studied a great many plans and had spent—some of us had been particularly interested in them for a period of two or three years.

Plans at that time fell into two general classes. There were many different types, but plans fell into two general classes. One was the so-called insurance plan or the trust plan where the securities were all put in government securities. The funds of the trust were all put in government securities. Now, this type of plan had the assurance of protection and of careful conservation of principal. On the other hand, it had very little chance of enhancement in case of an inflation. It was a good guard against deflation.

(Testimony of Albert W. Hughes.)

The second type of plan that we found was the plan where a company or a trust fund invested the funds in common stock commonly of the company itself, in some cases common stocks as a group. We did not feel that that sort of a plan was desirable because we had seen in the experience of the forties plan after [117] plan of that sort go to smash.

Therefore, in trying to find a plan—we considered both of these types of plans, and neither one seemed to us desirable and sound for our company; therefore, we developed this plan which has two different features as one plan that would be suitable for the Penney Company.

We did that in this way. We said that all the funds that came into the plan would be invested in government securities. That was up until 1948 when we changed to a deferred annuity plan. This meant that we were trying, as far as humanly possible, to see that any funds to the credit of a participant in the plan would be paid a hundred cents on the dollar regardless of conditions.

Then we included two hundred thousand shares in the plan because we felt that in a period of inflation if we went into it there would be probably an enhancement in the value of these 200,000 shares, and, furthermore, in a period of inflation there would probably be increased earnings, and, therefore, increased dividends. We were trying to guard our plan against either deflation and the bad effect on participants, or inflation with a bad effect on participants. It was a balanced plan as we called it.

(Testimony of Albert W. Hughes.)

We rejected the idea of an insurance plan. Although two or three of the directors were very much interested in it, we rejected it as a group, the board of directors, for one reason [118] among others because it would impose a fixed annual charge on the company, and in our company we do not like fixed annual charges. We try to have flexibility, if possible. The idea of a fixed annual charge to provide for retirement benefits runs counter to the whole philosophy of our company, which works this way, what a man gets depends on the results he obtains.

Therefore, in this plan we made the company's contributions dependent upon the profits that the company made annually. Also with the 200,000 shares of stock in the fund, it meant that the dividends upon that stock would be dependent upon the earnings of the company and on the consequent dividends.

There was another point that we had in mind in making the contributions dependent on the company's results. There was another point. We wanted the store managers in every store and wanted the men in the central offices to be interested in the company as a whole as much as an individual store. We had a very generous profit-sharing contract basis for managers. We wanted to have a manager in one store interested in the manager of another store, and we felt that by making company contributions dependent upon company profits, we would assure greater cooperation on the part of the man-

(Testimony of Albert W. Hughes.)

agers and also greater cooperation between the New York office and the management group and the managers of the New York office.

There was another factor in this situation. We were trying to help men underwrite the unknown future regardless of [119] what time or on what occasion or for what reason they left the Penney Company.

In 1937, 1938 and 1939, when we were studying plans, we found that the great majority of plans, at least a very large percentage of them, were intended to take awfully good care or take some measure of care of a man after he reached retirement age, but we found in those plans a disregard for the man who did not reach retirement age. In non-contributory plans, most of the men who were fired before they reached retirement age got nothing. In contributory plans, generally speaking—this is the pattern in 1939 and 40,—in contributory plans, the participant in most of them got nothing except his own personal contributions either with interest—with no interest or with interest at two or three per cent. I make that statement advisedly because we studied plan after plan.

We wanted to provide a generous retirement plan, and we felt we would, and we wanted to take care of the man who for some reason might have to leave the employment of the company before he reached retirement age; therefore, we provided in this plan a provision that a man separating from the company for any reason would get one hundred

(Testimony of Albert W. Hughes.)

cents on the dollar of all the credits to his account in the plan.

In that connection, if I may, I would like to borrow an exhibit——

Mr. King: If your Honor please, the question asked of [120] the witness is why they put stock in the plan. We are now getting a lecture on the whole subject. I object to it as immaterial, but if your Honor wants to hear it, it is all right with me.

The Witness: I am trying to lead up to that, and I said I would give considerable information.

The Court: Go ahead.

The Witness: I would like to ask for an exhibit which is Mr. Trown's presentation to the board of directors.

Mr. King: 123.

The Witness: If I may have a copy of it, there are two very short paragraphs I would like to read.

(Document presented to the witness.)

The Witness: In this Exhibit 123, the third part of it—this was the proposal that was presented to the board of directors by Mr. Trown—in the third part of it there is a section called “Explanatory Matter.” In Section 10(b) of it, the pages are not numbered, there are two short sentences which I would like to read—three sentences.

It says, “Any participant leaving the employ of the company, on other than an approved leave, for any cause whatsoever other than approved retirement, must withdraw from the Fund. Withdrawal

(Testimony of Albert W. Hughes.)

of a deceased participant's account is also provided."

Now, these are the next two sentences:

"Such a separated employee would receive in cash (unless electing to accept an annuity which privilege is extended) [121] everything that he or she would receive if retiring at the date of separation except shares of stock."

Now, here is the real crux of what I want to refer to:

"This provision may be contended as being over liberal, but has been purposely included as an extension of the principle of ownership participation which has always operated in the company."

Mr. Trown included that, and I use it only as a verification of our experience and observation that most plans did not permit the participant that sort of a generous set-up that in any case whether a man was fired for dishonesty or whether he separated for some other reason, he got a hundred per cent of what was to his credit.

Now, I come to the last point, and that is the point to which I was leading up to.

We had set up a plan that we thought was very liberal. It had an unusual provision in it that I have just mentioned, and then we added to that the privilege of a man getting stock when he qualified for retirement. We did that, first, because we wanted to emphasize his interest, again, in the company as a whole in order that he would do his best to enhance the value of that stock if he qualified for re-

(Testimony of Albert W. Hughes.)

tirement. Second, we had observed as a result of our experience that quite a number of managers, if they had become or got in a comfortable position, in other words, they were in a store that was going along pretty [122] well and they were receiving a good compensation, that those men had a tendency to let down as they got older in point of service. We called it the "middle age sag." We had a regular term for it.

We did not set up this privilege of getting stock on later retirement as an inducement to a man to stay with the Penney Company. We did not have to induce men to stay with the Penney Company. We set this up as an extra incentive so that men would not sag back but would set new goals rather than staying just where they were. We felt that this stock was not intended as payment for long service. That did not enter into our consideration because we knew that under the liberal contract of profit-sharing the managers and other people had, certainly they were well rewarded for long service.

We did not set it up as a provision for a sick man or in case of death because our sick benefit, our liberal profit-sharing, our group insurance, took care of those provisions. We set it up as an incentive so that a man would strive constantly, particularly as he approached retirement age, to lift higher, hoping to increase his earnings, and, therefore, increasing the contribution to the retirement fund and the annuity in the stock he might get at the end of it.

(Testimony of Albert W. Hughes.)

Now, lastly, and I always like to hear the preacher say that, too, lastly we deferred the question of a man getting stock until he reached retirement age because of our very [123] unfortunate experience with Penney stock in the past.

Men who had received classified stock and then had converted that stock into Penney common and men who had the privilege of buying expansion stock had not held that stock. For various reasons they had gotten rid of it. In 1925 every share of Penney stock was owned by people in the Penney Company. In 1929 the stock went on the board. By 1940 over 53 per cent of the Penney stock had passed out of the hands of men who had the opportunity to buy it and was in the hands of outsiders.

This sort of practice defeated two of the main purposes the company had in mind in its original ownership of the stock because it did not preserve an interest in the company in whole, and it did not provide security and a nest-egg for their later years.

I can sum the whole thing up in about one sentence, which I probably should have done at the start, that the purpose of this plan, insofar as it pertained to the stock provision, was in the best judgment of the board of directors to the interest of the Penney Company and all, every possible or prospective participant. I apologize for the length of my answer, your Honor.

The Court: That is all right.

Mr. Young: That is all.

The Court: I think this is a good time to take

(Testimony of Albert W. Hughes.)

a recess because I want to ask a question or two.

As I understand it, Mr. King is making a contention that the 200,000 shares of Penney stock originally sold to the trustee was paid for by the original participants, and I also recall that you, Mr. Young, took violent exception to the statement of Mr. King. I believe your whole case, or much of it, is predicated upon the ability to prove payment of stock by the original participants, is that right?

Mr. King: Yes, you have it right, your Honor, except that I say it was paid for by their money or by funds borrowed by the trustee at their financial risk.

The Court: Yes, I know that. Perhaps when we come back this afternoon, a question could be asked Mr. Hughes to explain how the stock was paid for. Could you do that, Mr. Young?

Mr. Young: Yes, I was going to say that I have no further testimony in the case, and I would prefer, your Honor, to stay here a little longer at this time, if you wish.

The Court: Is this the end of your case?

Mr. Young: Just a moment, please.

(Discussion off the record between counsel.)

Mr. King: I think, your Honor, if we are not going to adjourn until twelve, he might want to wind it up, but I would want to cross examine a little bit.

Mr. Young: We will come back after recess then.

The Court: In view of the fact that there is only

a very little testimony to be put in, would you want to come back a [125] little earlier?

Mr. Young: One-thirty.

The Court: One-thirty, or do you want to wait until two?

Mr. King. One-forty-five would be all right. I eat a little more than Mr. Young. He has always been thin, but I think I could get here at one-forty-five.

The Court: We will recess until two o'clock.

Is it your contention, Mr. Young, that you do not need any testimony to prove the point that it was not money that belonged to the participants?

Mr. Young: That is right, your Honor.

The Court: Does the record so show?

Mr. Young: The record so shows, according to our views, exactly so.

The Court: I did not realize that. I thought perhaps you wanted some testimony.

Mr. Young: We will come back at two o'clock.

(Noon recess taken.) [126]

Afternoon Session

Court reconvened, pursuant to recess, at 2:00 P.M.

ALBERT W. HUGHES

a witness in behalf of Defendants, resumed the stand and was further examined and testified as follows:

Mr. Young: The plaintiff may cross-examine.

(Testimony of Albert W. Hughes.)

Cross Examination

Q. (By Mr. King): Mr. Hughes, I understood from your testimony this morning that you at least had spent a long period of time in consideration of a possible profit-sharing retirement plan for the Management staff of the Penney Company?

A. That is correct.

Q. And I believe you stated that you had reviewed plan after plan in consideration of your proposed plan for the Penney Company?

A. That is correct.

Q. Can you name to me a single plan that has any provision in it similar to the one that is in this profit-sharing plan that is involved in this action with respect to the awarding of stock to participants in the plan? A. No, sir; I cannot. [127]

Q. When you referred, Mr. Hughes, to a contributory plan, you meant a plan where the participants made contributions; is that correct?

A. Yes, sir.

Q. Can you name a single contributory plan in which a person who failed to continue in the employment up to retirement age got nothing if he withdrew?

A. I didn't make that statement as to the contributory plan.

Q. Would you tell me what you meant to say with respect to contributory plans?

A. Yes, sir. I think because I spoke so lengthily you probably are confusing two things. I said in non-contributory plans many participants got noth-

(Testimony of Albert W. Hughes.)

ing if they left before the retirement age. In contributory plans, in some of them they got their money back, and in others they got their money back with 2 or 3 per cent, and that was all.

Q. I see. You don't know of any contributory plan where they did not get back their contributions, at least, or their contributions plus some additional amount? A. No, I do not, sir.

Q. Now, Mr. Hughes, you remember the provisions of the Plan with respect to the purchase of stock by the Trustee? A. Yes, sir.

Q. As you stated, I believe, in your deposition, the Trustee bought the stock that it got? [128]

A. Yes, sir.

Q. Now it bought the stock and it pledged the stock as collateral for a loan from the Continental Illinois National Bank and Trust Company; is that right?

A. The Trustee pledged the stock as collateral for the loan; yes, sir.

Q. Suppose that the stock had dropped right after that loan was made, and suppose the stock had dropped, we will say, to \$50 a share, and the Continental Illinois National Bank and Trust Company had foreclosed on it. What would become of the contributions of the participants that were used to pay part of that loan?

Mr. Young: That is objected to as academic, and on the ground it does not appear that the stock ever went down. It was always up.

(Testimony of Albert W. Hughes.)

Mr. King: It didn't go down. I am asking a hypothetical question.

The Court: Objection overruled.

Mr. King: Thank you.

A. That note was a three-year note. It provided that all funds received by the Trustee should be used for repayment of that note. In Mr. Trown's projections in a document which I think you have in front of you——

Q. Exhibit 123.

A. Yes, sir—there are tables showing that the participants' [129] contributions would run anywhere from \$1,900,000 to two and a half million—I am using approximate figures—and that the dividends on the stock at the rate it had been earning for the last four or five years would run around a million dollars a year. And the company had made a profit every year of its existence except one year, in 1920. Therefore, it is a common-sense conclusion that if the stock had gone contrary there would still have been no reason for the bank to foreclose.

Q. J. C. Penney Company assumed no liability with respect to the payment of that note, did it?

A. I don't think it did, sir, except that the company could not curtail or change the contribution until the note was paid. That is in the Trust Agreement, I think you will find.

Q. But aside from those provisions in the Trust Agreement you have referred to, the company assumed no liability with respect to the payment of

(Testimony of Albert W. Hughes.)

the note due the Continental Illinois National Bank and Trust Company?

A. No, sir. It was a transaction between the Trustee and the Continental Bank. Perhaps I should ask for a chance to check that bank loan before I let those answers stand. I would like a chance to do that, if you have a copy of that that I may see.

The Court: I suggest that Mr. Stone answer that. Do you know the provisions of the Trust Agreement or the provisions [130] as to the loan?

Mr. Stone: Yes, sir. I have in my hand the loan agreement and the note. Those are Exhibits 210 and 211. In the loan agreement:

“Penney agrees that no amendment or change shall be made in the terms or provisions of said Agreement of Trust or Plan, which directly or indirectly may affect any of the rights or benefits of the Bank in, to or in connection with the ‘Fund,’ provided for in said Agreement of Trust, or which may directly or indirectly operate, then or in the future, to reduce the amount of such ‘Fund,’ without in each case the consent in writing of the Bank; provided, however, that the Bank shall, upon request of Penney, consent to an amendment or amendments of the Plan, which operates solely to reduce the annual contributions, required to be made from time to time by participants in the Plan, to an amount not less than 25 per cent of such participants’ annual compensation, as defined in the Plan.”

Then follows this paragraph:

“Further, Penney hereby agrees with the Bank

(Testimony of Albert W. Hughes.)

that, so long as said note evidencing said original loan shall be unpaid in whole or in part or there [131] shall be any other outstanding and unpaid indebtedness of the Trustee to the Bank, Penney will, annually and promptly, make the contributions, provided to be made by it under the Plan as now in force, in cash at or before the times, in the manner and in the amounts so provided in said Plan, and that Penney further will not reduce the amount of its contributions, provided to be made by it under the Plan as now in force, below the amounts which are required to be contributed by it, from time to time, under the Plan as now in force, and that Penney further will not discontinue making the contributions, provided for under Section 6(a) of the Plan as now in force, regardless of the amount of the 'Reserve for Retirement Account' and will not exercise any rights, granted to it under Section 15 of the Plan as now in force, to decrease or dispense with any Company contribution called for under the Plan as now in force or to substitute any form of stock or securities for cash contributions."

Then, just to complete the paragraph:

"The Trustee, however, shall have no right or power and shall be under no duty to enforce [132] this covenant of Penney."

Your Honor, this is Exhibit 210, the Loan Agreement, which is an agreement made by and between Continental Illinois National Bank and Trust Company of Chicago and The Chase National Bank of the City of New York and J. C. Penney Company.

(Testimony of Albert W. Hughes.)

The Court: In other words, J. C. Penney Company did not guarantee the payment of the loan, or did not execute a hold-harmless agreement, an indemnity agreement, but did agree that it would pay the amount specified in the Plan, and that amount was an amount equal to 2 per cent of the total wages paid to the employees; is that correct?

Mr. Stone: Yes, sir; 2 per cent of salaries of participants, eligible participants, in the Plan.

The Court: That was a definite amount it was required to pay, and all the rest of the payments were predicated on a profit being made by the company.

Mr. Stone: Yes, sir.

The Court: And by the individual managers.

Mr. Stone: I think that is correct, sir, including, of course, dividends on the stock which could also be used to repay the loan.

The Court: Yes, but that was predicated on the company making a profit.

Mr. Stone: Yes, sir. I just wanted to bring that out. [133]

The Witness: Your Honor, may I make a statement?

The Court: Go ahead.

The Witness: Dividends are not always involved in profit.

The Court: It might have been past profit?

The Witness: That is right; might have been surplus. The Penney Company for many years had ample surplus where it could have carried dividends.

The Court: It had an unbroken dividend record from its inception except for one year?

(Testimony of Albert W. Hughes.)

The Witness: It had an unbroken dividend record. Its profit record—in 1920 it lost, and that is the only year since it started. But it did have an unbroken dividend record; yes, sir.

The Court: Go ahead, Mr. King.

Q. (By Mr. King): Now, Mr. Hughes, as I understood your statement in answer to a question asked you this morning, you considered that this stock was to be held for people who could continue on with the company until reaching retirement status?

A. I don't think I said that, Mr. King.

Q. Tell us what you said, then. I will admit it was rather a long answer and I didn't get all of it.

A. I don't blame you. I said that it was an extra incentive for men who qualified for retirement. [134]

Q. In my question didn't I ask that? I said it was to be held for men who reached retirement status. Isn't that the same thing?

A. That is not what you asked me. Pardon me, sir. You asked me if it was for men who stayed with the Penney Company long enough, and there is quite a difference, I think. Maybe I am making a difference without a distinction.

Q. I will reframe the question.

Mr. Young: Complete your explanation, if you wish to.

A. My explanation is it was something intended for a man——

Q. (By Mr. King): A little louder, Mr. Hughes.

A. My explanation of the difference I make is

(Testimony of Albert W. Hughes.)

that your question sounded to me as though it was something which was intended for a man who hung on indefinitely. That was not the reason for the Plan. The reason for the Plan was for a man who performed well. That is what was stated in the introduction of the Plan. It was a Plan for men who performed well and who reached retirement status.

Q. And the Company would be the judge as to whether they performed well?

A. I don't know who else could be.

Q. I take it your answer to my last question would be Yes? A. Yes, sir.

Q. Now, Mr. Hughes, the shares of stock held by the Trustee were intended to be for those men who continued on in the [135] employ of the company and performed well until they reached what I referred to as retirement status and what you referred to as retirement age. Is that correct?

A. I would accept either term, sir.

Q. What is your answer?

A. I would say Yes to your question.

Q. What?

A. I would say Yes to your question.

Q. Assuming that there was a man by the name of Trumbull—I haven't seen that name mentioned, but assume there is a man named Trumbull, and that he was a very fine manager, and that he had trained, say, at least a dozen managers, and he continued on and performed well with the company until he was 59 years old and 360 days, whereupon he

(Testimony of Albert W. Hughes.)

was struck by an automobile and killed. Would he be entitled to any of that stock?

A. He would not, sir.

Q. Suppose that he performed well with the company until he was 59 years and six months old, whereupon he made a mistake in the administration of the store, and you thought it was a very serious mistake and you discharged him. Would he be entitled to any of the stock?

A. I would like to say more than two words on that. My answer would be that it would have to be a very serious mistake, of immorality or dishonesty, and in that case I don't [136] think he would be entitled to it. If it was a mistake of poor operation or merely a mistake in judgment, the company would have held him on.

Q. Let me reframe my question. Supposing that this Mr. Trumbull continued in the employ of the company from the inception of the Plan until he was 59 years and six months old, and then something happened which in your opinion warranted his discharge and you did discharge him at that time. Would he have been entitled to receive any stock under the Plan?

A. He would not.

Q. Suppose that the same Mr. Trumbull had been with the company and worked well and hard, and he suffered a heart attack when he was 59 years and six months old, so that he could not continue with his work. Would he be entitled to any stock under the Plan?

A. He would get it under the process that our

(Testimony of Albert W. Hughes.)

company has followed, because such a man would have been fully protected for six months or a year, or even a year and a half, under our sick leave and under extensions of it. That happened in repeated cases.

The Court: But he would not be entitled to retirement as a matter of right?

A. Not at all. He would have been entitled to it because he qualified for retirement status or retirement age, whichever [137] way you want to put it.

Q. (By Mr. King): Let me reframe my question. Suppose this man Trumbull had worked hard and had been in the Plan from the beginning, and worked well and industriously up until the time he was 59 years and six months old, and he suffered a heart attack and for some reason he was not continued on sick leave up until age 60. Would he have been entitled to any of the stock under the Plan?

A. That, I think, is a question that is hypothetical and impossible to answer, because there has been no circumstance in our years of operation of the Plan where we have taken care of such a man.

The Court: I think the witness has already stated in answer to my question that he would not be entitled to it as a matter of right.

Mr. King: That is what I mean. I am trying to bring out that if they didn't continue them on under sick leave until they were 60——

The Court: You don't have to ask any more questions on that. I agree with you.

(Testimony of Albert W. Hughes.)

Mr. King: All right. As long as that is understood.

Q. Now these managers, Mr. Hughes, the Plan provided that they didn't have any right to continue in their job; isn't that true?

A. That is correct. [138]

Q. And the company had the right, with or without cause, to discharge any manager at any time, did it not?

A. Technically that is correct. The Penney Company does not discharge men without cause.

Q. I am asking you whether they had the right to do so?

A. I said technically that is correct, they have that right.

Mr. King: No further questions.

Mr. Young: That is all, Mr. Hughes.

The Court: I notice that no one is willing to take my suggestion to find out from Mr. Hughes, if he is the proper man to discuss the matter or to give testimony, on whether or not the company paid the \$5,700,000, or ultimately the \$6,000,000 that went to pay for the stock, or whether the participants paid for it.

Mr. King: That is covered in the excerpts from the depositions, your Honor. I didn't read them in, but that is in there, and has already been covered by Mr. Hughes and others, I think Mr. Weiderman, that the Trustee paid for the stock and the company sold it, and the moneys that came in to the fund

(Testimony of Albert W. Hughes.)

from the contributions of these participants were used to pay off that loan.

The Court: The testimony is not only the funds contributed by the participants but the money contributed by the company also went in to pay the loan. [139]

Mr. King: Yes.

The Court: Of the funds held by the Trustee.

Mr. King: That is right, yes. And we have this legal proposition to be developed in our brief: That the minute these people, I mean the participants as a group, serving we will say through the year 1940, having made contributions there, the amount paid by them as a group became their money. The minute it was paid over to the Trustee it was their fund and no longer the funds of the company. That is the proposition I mentioned once earlier in the case. So that the contributions, what we will call received from the participants, plus the additional contributions of the company, both under the terms of the Plan went to pay for this stock.

The Court: I think I know your theory. Let me hear from Mr. Stone or Mr. Young or Mr. Pell. What is your theory of how this money was paid by the company, the six million dollars.

Mr. Stone: Your Honor, I will try to explain and make it clear.

The Court: What exhibit are you reading from?

Mr. Stone: I am looking at the moment at Exhibit 125, which is the original black booklet. I think in the outline it is made very clear. I am looking at

(Testimony of Albert W. Hughes.)

Page 4. I might say—I know you want me to explain something and not comment particularly on what Mr. King has said, but I would just like [140] to say, without any discourtesy, it seems to me he just disregards completely every term and condition of the Plan in order to arrive at his theory. Everything that was done was done precisely in accordance with the Plan and Trust Agreement as approved and accepted by the participants. But he has just set it aside and therefore arrived at some other theory.

I think the outline on Page 4, sir, possibly if we read it together, on the purchase of the Penney Company stock, the Penney Company agrees—I will summarize the thing, if I may——

Mr. King: Where are you summarizing?

Mr. Stone: From the outline of the Plan.

Mr. King: There are four headings on Page 4. Which one are you summarizing?

Mr. Stone: I started at the top of the page, under “Purchase of J. C. Penney Company stock.”

Mr. King: Yes.

Mr. Stone: Because I think that this tells the running story clearly.

The Court: Now, J. C. Penney Company sold to the Trustee 200,000 shares of stock at a price which was the book price or a price around book price?

Mr. Stone: Yes, sir.

The Court: Which was \$30.00. [141]

Mr. Stone: \$30.00.

The Court: Whereas the market value of that stock was around \$80.00.

(Testimony of Albert W. Hughes.)

Mr. Stone: \$80.00, sir. It was \$30.00 and reduced by two dividends that had been paid before the issuance of the stock on August 1, so that the price was \$28.50, and was subsequently increased by \$300,000 to make a full \$6,000,000.

The Court: That was as a result of a suit filed by a stockholder?

Mr. Stone: There had been a complaint. No merit was recognized in it, but in the course of settlement an adjustment was made and the \$300,000 additional brought it up to \$6,000,000. But the \$5,700,000 was the beginning of it.

Then under that, "J. C. Penney Company Contributions": The company will contribute two things to the Fund. First, two per cent of each year's salary paid to all of the eligible employes—I am paraphrasing a little—and, second, six per cent of any company net profit in excess of 15 per cent of the book value of the company for the year.

The note says that "All dividends on the 200,000 shares of stock purchased will, of course, accrue to the Fund." Of course, that is——

The Court: That is held by the Trustee. I follow you up to there.

Mr. Stone: Then the next thing is just that all assets [142] and receipts under the Plan become a part of the Trust Fund to be held by a bank or trust company as trustee in accordance with the terms of the Plan.

The next one deals with the disposition of the Fund receipts. The first one relates to the contribu-

(Testimony of Albert W. Hughes.)

tions of participants, and provides that a separate account will be kept for each participant to which will be credited the participant's contributions——

The Court: Yes, I understand your theory without your having to go through that. Let me just make a statement and see if I am right.

Mr. Stone: Surely.

The Court: It is your statement that the contributions made by the individual participants were always credited to the accounts of those individual participants?

Mr. Stone: Absolutely.

The Court: And that, therefore, ultimately, by the contributions of the company of the 6 per cent of profits and 2 per cent of the wages that the original \$6,000,000 was paid by the company. Is that your theory?

Mr. Stone: With just a little variation, sir. All the moneys that came in, participants' contributions and everything, went over to pay the \$5,700,000 to cover the stock of the Trustee. At the same time every participant had his own contributions credited to his account, and if he left the [143] company he took 100 per cent of those contributions with him along with any other credits. The use of his money, the use of the contributions that came in from participants—let's put it that way—that went into the Trust Fund and then went over to the loan did not affect in any way the participant receiving the full amount of his contributions when he left, because he

(Testimony of Albert W. Hughes.)

was credited with the full amount and would always be sure to get 100 per cent of his credits.

Then the 2-per cent contribution plus the dividends, the earliest dividends, went to cover the 50,000-share block, the cost of that block, the 2-per cent contribution continuing to cover the balance of it.

There are two separate steps, and I think that is where the confusion arises. This repayment of the loan to the bank from receipts that come into the Trust Fund, which don't have any identity—once they get into the Trust Fund they go in to pay off the loan and the stock comes back. But the important question is whether the loan was paid off or not, if a man went out before the loan was paid off, as some men did, they would nevertheless receive 100 per cent of their contributions, because there was always a reserve kept to pay them. That could not affect them. They were always paid in full. Trust Fund moneys were being used and each participant received 100 per cent of what he was [144] entitled to.

The Court: You don't contend that the company paid the \$6,000,000? You contend it was paid out of all of the funds received by the Trustee?

Mr. Stone: Absolutely, sir, which consisted of the sources from which funds were used to pay off the loan, participants' contributions, company contributions, dividends, and all of those things.

The Court: I was in error. Mr. Young and Mr. King had an argument in my chambers one day on

(Testimony of Albert W. Hughes.)

one of the pre-trial hearings, and Mr. Young denied a statement made by Mr. King, and I thought that at the same time he asserted that the \$6,000,000 was paid by the company.

Mr. Young: No, your Honor.

Mr. Stone: Paid by the Trust Fund, sir.

The Court: Out of funds received by the company?

Mr. Stone: Yes. In the Trust Agreement it specifically says, "Inasmuch as it is hereinafter provided"—I am reading from Page 39 now of this booklet—"that moneys received by the Trustee from dividends, and from the company's and participants' contributions under the Plan shall be paid to the Bank on account of payment of interest and principal of such loan," and so forth, and then in a subsequent part of it it says specifically that all those moneys coming in shall be applied to the repayment of the loan. [145]

The idea was to clear up the loan in as short a time as possible for the benefit of all participants, get the stock back, and have no further interest to pay. And in the meanwhile any participant was fully protected. He couldn't lose anything.

Mr. King: What page are you reading from?

Mr. Stone: I was reading that from Page 39.

Mr. King: Page 39.

Mr. Stone: It is Article Fourth. I started to read from the third paragraph.

Mr. King: Yes, that is right.

Mr. Stone: May I call your Honor's attention

(Testimony of Albert W. Hughes.)

to just one more provision, even more specifically, in the Trust Agreement, on the matter of the use of the funds to pay off the loan. That is on Page 40, where it reads, "Subparagraph D:

"Anything in the Plan or this Agreement of Trust to the contrary notwithstanding, except as hereafter provided in subparagraph E of this Article, the Trustee shall apply all cash dividends, received by it on the shares of J. C. Penney Company stock above referred to, as well as all other moneys received by it from J. C. Penney Company or from participants in the Plan, from time to time when and as received by it as [146] follows:"

In the next paragraph, which I will not read, there is a right to reserve certain moneys.

The next paragraph:

"Second, any balance of such moneys, so received by the Trustee and not so reserved, shall be paid to said Bank, to be credited first on any then matured and unpaid interest and then on any unpaid principal of any such indebtedness of the Trustee to the Bank, regardless, in any case, of whether or not such principal shall then be due."

In other words, the Trust Agreement and the Plan contain, as we understand it, everything precisely in accordance with the terms——

The Court: Do you agree with Mr. King's contention that the contributions made by the company of an amount equal to 2 per cent of the salaries of the managerial staff, plus 6 per cent of the profits over 15 per cent of the book value, con-

(Testimony of Albert W. Hughes.)

stituted a portion of the earnings of the managerial staff and belonged to them as a matter of right as of the close of any fiscal year?

Mr. Stone: I certainly do not, and I really cannot understand the contention. When a company sets up a plan, and agrees to contribute to a trust under it, and those moneys are held subject to the trust, those moneys do not belong to [147] the individual participants, by any means. Companies just would not set up plans or conditions if that followed.

The Court: Although it was part of the inducement for employes to continue with the company and work for the company?

Mr. Stone: To have a plan of this sort? But of course, sir. I agree. And many other inducements. The profits of the company from which it makes its contributions are produced by all the employes of the company working together. Of course, the management group produced a good bit, but the Penney Company at times employs, I believe, as many as 50,000 people.

The Court: Mr. King, is it your contention that in all of these pension plans set up by various companies, in which the company is required to pay into the fund a percentage of the profits, that the money so contributed belong to the employes?

Mr. King: After they complete each year of service in accordance with the provisions of the Plan, then those moneys become the average earnings of the employes of the group, and this Plan

(Testimony of Albert W. Hughes.)

says in so many words that after that contribution had been made and had been paid to the Trustee the company no longer had any interest in it.

The Court: Yes, but that doesn't mean that any individual has a right to withdraw any particular amount out of the Plan [148] except in accordance with the provisions of the Plan. I think that is Mr. Stone's position.

Mr. Stone: Yes, that is exactly it.

Mr. Pell: Your Honor, under the terms of the Plan nobody could withdraw anything until he separated from the company. And certainly, on Mr. King's point, the Department of Internal Revenue recognized that until a man leaves the company these funds are not his property. Otherwise he would have to pay an income tax on the company's profits which are contributed every year. And that is not the case.

Mr. King: Well, I just wanted to say, your Honor, that Mr. Stone says there was an account where these contributions were credited to these individuals. But until this stock was paid for they might have had an account, but they didn't have any money to pay it out, because under the provisions of Paragraph 40-a, Page 28-b, of the Pre-Trial Order, it shows that, for instance, the employees on August 1, 1940, contributed \$1,575,000, and on the close of business that day, after paying one and one-half million on this note, the Trustee had in its hands only \$75,000, although on these

(Testimony of Albert W. Hughes.)

accounts there must have been credited \$1,575,000. So it shows where the money went.

Now, I want to point out that that Paragraph 40-a shows that as fast as these moneys came in they went to pay off that loan. And they can say all they want to about them [149] crediting them. If the whole thing had folded up as early as December 21, 1941, there wouldn't have been anything in there for these people to get their money back. You can say all you want to about them getting it back and having an account with the credit there. There wasn't any funds there to pay them.

The Court: Yes, but there was stock there.

Mr. King: That is the point. We contend that that is just the point. The stock was there, and these people who paid for it were the beneficiaries of that stock. And it doesn't lie in equity and in justice for this company to contend that they can withhold the stock from these people when somebody else bought it.

The Court: Supposing that instead of buying Penney stock they bought U.S. Government Bonds?

Mr. King: It would be the same thing. The mere fact it is Penney stock—I asked Mr. Hughes this question, because I made a study of that: I asked him to point to a single plan where a company sold a trustee something and then when they tried to withdraw the people that paid for it couldn't get it. That is the reason I asked him that question. He examined plan after plan and he didn't find any plan like that.

(Testimony of Albert W. Hughes.)

The Court: I am not too impressed about your statement that there was only \$75,000 in the account. When you deposit [150] \$75,000 in a bank and there is, perhaps, \$100,000,000 in the bank, they don't keep all that money in cash. They buy securities with it. Even though you have credit for the full amount, obviously it could not be paid if everyone asked for it at the same time.

Mr. King: I wasn't making the point for that purpose, your Honor. I was merely pointing it out to show that the contributions of the participants went to acquire stock. Suppose they had enough money in the Trustee's hands over and above these contributions to equal these credits. But they didn't have. Furthermore, in Exhibit 208-D, I think it is—wait a minute. It is 222-D—Mr. McAlpine wrote in and wanted to know why he didn't get more money than he got. And they very frankly told him that his money had been used to pay for this stock, and therefore it hadn't earned anything. It says that right here in 222-D. He wrote in and he says—in 222-C he says to Mr. Trown: "Your fine letter of September 4th received. I have a statement here which says 'Annual Statement of Account for Year Ending December 31, 1940,' and so forth. Now, please explain to me what this amount of money has earned in the eight months of 1941 and where do I come in on that?"

Mr. Trown writes back: "I am indeed sorry, but it appears to fall to me to give you disappointing information. The amount of the check which you

(Testimony of Albert W. Hughes.)

received represents [151] the full amount due you from the Fund. This results from the fact that the Fund to this point has had no moneys for outside investment. In the early stages of the Plan all moneys have had to be used to cover the purchase price of the 200,000 shares of J. C. Penney Company stock which was purchased by the Fund. Further, until the purchase price of the 50,000-share block is covered, all dividends received are applied to that cost. Further, the excess profit contribution by the company is an annual matter and does not apply to prior part-year participation. All this adds up to the fact that to this time no credit other than reflected in the check submitted is available. This is all covered in the Plan booklet, which I realize may be difficult to understand."

The Court: I don't see how that conflicts with anything.

Mr. Stone: No, we agree with everything stated in the letter and stand upon it.

Your Honor, there is one fact I would like to throw in, talking about the amount of reserve on hand. In the year 1940 four men withdrew. The total aggregate amounts withdrawn amounted to \$3,436. There was always an adequate reserve. That was Exhibit 292 I was quoting from.

The Court: Mr. King, I think that in order to sustain your position you not only have to establish that this Plan was a lottery, but don't you also have to establish the [152] severability of the par-

(Testimony of Albert W. Hughes.)

ticular money contributed in the first two years from all other provisions of the Plan itself?

Mr. King: That is right, your Honor. We think that the law is adequate that where a trust is set up and one phase of it is illegal it is severable. That is our theory in this case.

The Court: All right. Mr. Hughes, you have been sitting here on the stand all this time. Did you want to ask Mr. Hughes any questions?

Mr. Young: I have no further questions.

The Court: That is all.

(Witness excused.)

Mr. Young: If the Court please, that concludes the testimony on behalf of defendants. At this time I would like to take up a matter which was referred to this morning in order to clarify it. Your Honor raised the question as to whether or not it was proper to consider the fact that a plan is set up for a valid business purpose negatives the matter of a lottery, and the question arose as to whether or not we would be at liberty to introduce testimony of Mr. Hughes in that respect.

I wanted at this time to call your attention to the fifth Contention of Law made by the plaintiffs, where they say: [153]

“Plaintiffs contend that the trust purported to be created with respect to the 200,000 shares of stock was in effect a lottery, and against the public policy of the State of New York, and void.”

Defendants deny plaintiffs' Contention of Law

No. 5. It is our position that in the light of a contention of that sort which is devised by us, under the denial we would have the right to show any circumstances indicating that the Plan and Trust Agreement were created to serve a valid business purpose.

I am not prepared at this time to go into a lengthy dissertation on the law on that subject, except that for the purpose of the suggestion I am about to make I want to call your Honor's attention to one paragraph in 12 American Jurisprudence, 744, which reads as follows:—

The Court: Just a moment. Don't put this in the record.

(Statement by the Court off the record.)

Mr. Young: In that situation I am going to state Young on law, your Honor.

The Court: All right.

Mr. Young: Because I am asserting at this time that we will be able to establish by cases, as [154] distinguished from these not-so-good treatises, Corpus Juris and American Jurisprudence, this proposition: That it is in order for the Court to consider all testimony surrounding the circumstances under which a contract is entered into when a charge is made that the contract is illegal or void.

The Court: You don't have to go to American Jurisprudence for that. You have got Oregon and California cases directly in point.

Mr. Young: Surely, except I didn't have a great deal of time during the noon hour to get anywhere on the subject. I just want to state this proposition.

Now in that situation, your Honor, it is our position that the present state of the contentions permits us to show that matter to the Court.

I pause a moment to see whether your Honor has any view otherwise upon that subject; because if there is any view otherwise upon the subject, I think that this is the time when we should be allowed to have the opportunity to make any addition that might be necessary to prevent any manifest injustice.

The Court: Read that again, that Young on Jurisprudence.

Mr. Young: Young on Jurisprudence, your Honor, or, rather Young adopts this principle: That there is a presumption in favor of the legality of an agreement, and although an agreement is illegal, if the illegality does not appear on [155] its face it must be proved by the person who asserts it. The rule is established that where a written instrument is attacked upon the ground that the agreement is offensive to law and violative of public policy the whole transaction should be inquired into, and the Court will not expect itself to be embarrassed by any technical rules regarding the admissibility of evidence.

With due regard to your Honor's comments upon the source of that authority, including the speaker, it is our position that the contention is adequate to cover this point. However, this is an important piece of litigation, and if there is any question whatever in the mind of the Court as to whether or not evidence upon that subject is to be considered——

The Court: Oh, I will consider the evidence.

Mr. Young: Very well. That settles it. I was going to make a suggestion——

The Court: Is there any ruling from the income tax division of the State of New York or the Attorney-General of the State of New York with reference to the validity of this Plan?

Mr. Pell: No.

Mr. Young: It has never been presented.

The Court: How about the State income tax? What happened there? [156]

Mr. Stone: May I inquire of the Secretary in charge of taxes? We are more familiar with the Federal income taxes.

Mr. Pell: The important thing is Section 165 of the Federal Act, which we do get.

The Court: Yes, but the contention here is being made that under the laws of the State of New York this is a lottery and illegal. I was merely inquiring to find out whether there was already introduced in evidence an opinion of the Attorney-General of the State of New York or an action of an administrative body in the State of New York which is charged with the responsibility of administering the income tax laws.

Mr. Stone: Mr. Raskopf, the Secretary of the company, informs me there is no necessity to qualify this Plan under the provisions of any New York income tax law, and therefore there would be no ruling. As your Honor is aware, in Paragraph 64 of the Pre-Trial Order is set forth the rulings received from the United States Treasury Depart-

ment qualifying this Plan as an exact plan. Mr. Raskopf also mentioned that California does require such a qualification. The Penney Company pays taxes in many states, and all the papers were sent to California and the tax deduction is allowed there.

The Court: That is not in the record. I will repeat: I will consider the testimony of Mr. Hughes with reference to his intentions, at least. [157]

Now, Mr. King, do you have any rebuttal testimony?

Mr. King: No, the plaintiff rests.

Mr. Young: In that situation, your Honor, the defendants now make a motion which I think your Honor may regard as surplusage, but to the end that the record is clear upon the subject as to our position, we move that the cause be dismissed for the reasons that were assigned at the time that we made the original motion at the commencement of this trial.

The Court: All right. I don't think there is any action that I have to take on that motion.

We have already determined a time schedule for briefs.

Mr. King: It is in the record. I didn't take it down, but I know it is in the transcript.

The Court: Then the case is submitted. This case as well as the Burkitt case is submitted.

Mr. King: Yes, your Honor. Do you want any oral argument on it? I would presume not.

The Court: I will let both you and Mr. Young determine the procedure in this case. If you think

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The Court: I will let both you and Mr. Young determine the procedure in this case. If you think

that it is advisable to have an oral argument, I have no objection to oral argument.

Mr. King: I didn't know. I just wanted to [158] be clear.

Your Honor didn't make any indication the other day whether you wanted it or not. I didn't know.

(Whereupon proceedings in the above case were concluded.)

[Endorsed]: Filed February 2, 1955.

[Endorsed]: No. 15125. United States Court of Appeals for the Ninth Circuit. Harvey L. Wells and Harry J. Albertsen, on behalf of themselves, and others similarly situated, Appellants, vs. J. C. Penney Company, a corporation, and The Chase Manhattan Bank, a corporation, successor in interest to the Chase National Bank of the City of New York, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: May 10, 1956.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 15125

HARVEY L. WELLS and HARRY J. ALBERT-
SEN, on behalf of themselves and others sim-
ilarly situated, Appellants,

vs.

J. C. PENNEY COMPANY, a corporation, and
THE CHASE MANHATTAN BANK, a cor-
poration (substituted for The Chase National
Bank of the City of New York),
Appellees.

STATEMENT OF POINTS

Pursuant to Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellants hereby make the following statements of points on which they intend to rely on this appeal:

1. The district court erred in failing to find that the J. C. Penney Company profit-sharing retirement plan (for J. C. Penney Company management staff) and the agreement of trust provide benefits contingent on the lives of participants contrary to New York law.

2. The district court erred in finding that the retirement plan was not unfair, discriminatory or illegal because older employees, among them some members of the company's board of directors, who

were among the first to qualify for retirement with stock, received a greater number of shares than younger and future employees will receive when they retire. This error is contained in the district court's finding of fact No. 46 and conclusion of law No. 13.

3. The district court erred in finding that the retirement plan, so far as it pertains to the shares of capital stock of J. C. Penney Company, is not a wagering contract, lottery or tontine contract and does not violate the New York Constitution, statutes, laws and public policy prohibiting such contracts and schemes. This error is contained in the district court's findings of fact No. 47 and 48 and conclusions of law No. 5, 6, 7, 8 and 10.

4. The district court erred in admitting in evidence, over the objections of appellants, the testimony of Albert W. Hughes consisting of extrinsic evidence concerning the meaning of the retirement plan and trust.

5. The district court erred in failing to find that the trust purported to be established under the retirement plan, so far as it pertains to the shares of capital stock of J. C. Penney Company, was and is illegal and void and of no effect and in failing to adjudge and decree that the Trustee holds the shares of stock of J. C. Penney Company under a resulting trust in favor of appellants and those for whom appellants prosecute this action. This error is contained in the district court's conclusions of law No. 17, 18, 20 and 21.

6. The district court erred in finding that the stock portion of the retirement plan is unseverable from the remaining portions of the plan. This error is contained in the district court's findings of fact No. 43 and 44 and conclusion of law No. 9.

7. The district court erred in finding that it would be highly inequitable to permit appellants to recover in this proceeding on their own behalf and on behalf of the class for which they are suing. This error is contained in the district court's finding of fact No. 58 and conclusion of law No. 19.

8. The district court erred in failing to award appellants compensation for the reasonable value of the services of their attorneys in the prosecution of this action and for their costs and disbursements incurred herein, and in failing to decree that the sum so awarded should constitute a lien upon the shares of stock found by the court to have been acquired by the contributions and earnings of appellants and those for whom they prosecuted this action.

/s/ KING, MILLER, ANDERSON,
NASH & YERKE

/s/ RALPH H. KING

/s/ FREDRIC A. YERKE, JR.

/s/ PAUL R. MEYER

Attorneys for Appellants

Acknowledgment of Service Attached.

[Endorsed]: Filed May 10, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Pursuant to Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, Appellant hereby designates the following portions of the record on appeal as material to the consideration of this appeal:

1. Complaint, including Exhibit X and Exhibit A thereto.

2. Answer of defendant The Chase National Bank of the City of New York.

3. Answer of defendant J. C. Penney Company, excluding Exhibits A, B, C, D and E thereto.

4. The complete Pre-Trial Order, except the portions set forth in subdivisions (a), (b) and (c) below:

(a) Agreed facts numbered 27b, 27c, 41, 42, 43, 47, 48, 54, 55, 56, 79 and 81;

(b) Pre-Trial Order segregated as to Issue of Jurisdiction (pages 92 through 98);

(c) Index to Pre-Trial Exhibits (pages 99 through 122).

5. Transcript of proceedings.

6. Order transmitting original exhibits.

7. Opinion of Judge Gus J. Solomon dated December 29, 1955.

8. Order of substitution.

9. Findings of fact and conclusions of law.

10. Final judgment.

11. Notice of appeal.
12. Bond on appeal.
13. Designation of contents of record on appeal.
14. Statement of points.
15. This designation of record.

/s/ KING, MILLER, ANDERSON,
NASH & YERKE;

/s/ RALPH H. KING,
/s/ FREDRIC A. YERKE, JR.,
/s/ PAUL R. MEYER,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 10, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

COUNTER DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

Appellants having heretofore on May 9, 1956 served upon Appellees and filed with this Court their designation of certain portions of the record on appeal as material to the consideration of said appeal, Appellees hereby designate the following additional parts of the record which they deem to be material:

1. Portions of the Pre-Trial Order set forth below:

Agreed facts numbered 27 B., 27 C., 41, 42, 43, 55, 56 and 81.

2. This counter-designation of additional portions of record.

Appellees reserve the right to refer to and rely upon such of the exhibits in this case, on file with the Clerk of this Court, as Appellees deem to be material to the consideration of this appeal.

/s/ KOERNER, YOUNG,
 McCOLLOCH & DEZENDORE;
/s/ CLARENCE J. YOUNG,
/s/ WAYNE HILLIARD,
 Attorneys for Appellees.

/s/ W. H. DANNAT PELL,
/s/ HENRY STONE,
 Attorneys for Appellees.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 16, 1956. Paul P. O'Brien,
Clerk.

In the
United States Court of Appeals
For the Ninth Circuit

HARVEY L. WELLS and HARRY J.
ALBERTSEN, on behalf of
themselves and others
similarly situated, *Appellants*,

vs.

NO. 15,125

J. C. PENNEY COMPANY,
a corporation, and
THE CHASE MANHATTAN BANK,
a corporation (substituted
for The Chase National Bank
of the City of New York), *Appellees*.

APPELLANT'S BRIEF

Appeal from Final Judgment of the United States District
Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, JUDGE

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JUL 24 1956

PAUL P. O'BRIEN, CLERK



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In the
United States Court of Appeals
For the Ninth Circuit

HARVEY L. WELLS and HARRY J.
ALBERTSEN, on behalf of
themselves and others
similarly situated, *Appellants*,

vs.

J. C. PENNEY COMPANY,
a corporation, and
THE CHASE MANHATTAN BANK,
a corporation (substituted
for The Chase National Bank
of the City of New York), *Appellees*.

NO. 15,125

APPELLANT'S BRIEF

Appeal from Final Judgment of the United States District Court
for the District of Oregon.

HONORABLE GUS J. SOLOMON, JUDGE

STATEMENT OF JURISDICTION

The complaint filed July 11, 1951, alleged a controversy which exceeded the sum of \$3,000 exclusive of interest and costs and which was between citizens of different states (R. 4), thus giving the District Court jurisdiction pursuant to 28 U.S.C.A., Section 1332.

On June 7, 1954, the District Court heard preliminary arguments on issues of jurisdiction. The District Court subsequently ruled that the action was properly maintainable as a class action under Rule 23 (a) of the Federal Rules of Civil Procedure (R 248-250) and that the Trustee adequately represented the Trust, thereby making joinder of other participants as parties defendant unnecessary under Rule 19 of the Federal Rules of Civil Procedure (R. 250).

The action was tried on June 23 and 24, 1954 (R. 261). On December 29, 1955, the trial judge issued his decision. Findings of fact, conclusions of law, and final judgment were entered by the court on March 8, 1956 (R. 215, 254). Notice of appeal was filed April 5, 1956 (R. 256). This court has jurisdiction to hear this appeal by virtue of 28 U.S.C.A., Section 1291.

STATEMENT OF THE CASE

A. Preliminary Statement

This is a case of great importance to numerous persons. It is also a case the facts of which are not easily assimilated.

The persons involved were formerly either (1) managers of stores of J. C. Penney Company or (2) members of the management staff of that corporation. These individuals were forced by their employer to become par-

ticipants in a so-called "Profit-Sharing Retirement Plan." Their earnings and compensation were used to purchase 200,000 shares of the stock of J. C. Penney Company (later split 3 for 1). However, because of the provisions of the "Plan" each of such persons was subject to being disqualified from receiving even one share of such stock by the occurrence of any one of a number of events. Thus, a manager who was forced to resign because of ill health prior to attaining the retirement age of 60 received no stock. Similarly, the estate of a manager who died one day before reaching the age of 60 received no stock. A manager who was discharged without cause one day before reaching the age of 60 also received no stock.

Not only were participating employees deprived of any portions of the stock upon the occurrence of events such as those enumerated above, but also because of the provisions of the "Plan" the occurrence of such events increased the amount of stock to which the remaining participants became entitled.

The "Plan" thus imposed by J. C. Penney Company upon its employees was by its own admission unique and without parallel in this country. The uniqueness of the "Plan" may be attributed to a great extent to the fact that (1) participants stood to benefit from the predecease of fellow participants in whom they had no in-

surable interest and (2) the method for awarding the stock embraced the very elements which the courts have traditionally found present in schemes outlawed as lotteries or wagering contracts. Condemnation by the courts of such schemes has occurred despite avowed legitimate business purposes and despite alleged good intentions of the sponsors.

This action was instituted as a class action by two members of the group to which reference has been made. This court is asked to recognize that the stock in question is held under a resulting trust for those whose contributions and earnings were used to purchase the same.

B. Summary of Facts

1. Establishment of Plan

Effective January 1, 1940, appellee J. C. Penney Company, hereinafter referred to as "Company," established its Profit-Sharing Retirement Plan (for Management Staff), hereinafter referred to as "Plan" (R. 14-41). Appended to the Plan as "Exhibit A" was a Trust Agreement (R. 41-75) entered into by Company on July 8, 1940, with appellee The Chase National Bank of the City of New York for whom appellee The Chase Manhattan Bank of the City of New York has been substituted R. 214), hereinafter referred to as "Trustee."

The Trust provided that the Trustee hold, administer and disburse all funds and shares of stock accumulated under the Plan. The Plan was expressly devised as a substitute for the previous practice of making available for sale to managerial personnel "expansion stock" in the Company (Exhibits 2 and 55).

The Penney Company could, while the Plan was in effect, discharge a store manager or any other participant without cause (R. 178). At the same time every eligible manager or executive was compelled to participate in said Plan as a condition of continued employment with the Company (R. 302).

2. Purchase of Stock by Trustee

Under Section 5 of the Plan (R. 20), Company agreed to sell to Trustee 200,000 shares of the authorized unissued common stock of Company (book value on January 1, 1940, of approximately \$29.32 per share (Exhibit 145) for \$30 per share.

The sale of Penney stock to Trustee was completed at the outset of the Plan. According to the Company's "Explanatory Reference to Proposed Plan," paragraph "5" (Exhibit 2): "Under Delaware laws, the company * * * [could not] sell this stock without receiving payment in full for same at the time of sale." Not only did the law permit only an outright sale, but also the Company in this same paragraph "5" indicated the consid-

erable benefit to it by such sale, compared to some other retirement plan:

“In such a [n annuity] plan, however, there would ordinarily be some substantial outlay involved for older service eligibles. Under this plan, however, the company would have available for investment a sum of about \$5,500,000 representing the selling price of the stock. Considering only such amount, it appears we should anticipate some earning power by the use of same in the company's business even though the earnings might not average as high as the company's present rate of earnings on its capital. To offset the disadvantages of the tax non-deductibility [because of sale for value], the return on the \$5,500,000 would need be only slightly in excess of 3½%.” (Exhibit 2)

In order to pay for said shares of stock, the Trustee obtained a loan from Continental Illinois National Bank and Trust Company of Chicago, hereinafter referred to as “Bank,” and pledged said shares of stock as collateral (Exhibits 210 and 211). The 200,000 shares of Penney stock bought by the Trustee were divided into two blocks, one of 50,000 shares and one of 150,000 shares. On January 16, 1946, J. C. Penney stock was split 3 for 1 (R. 117). Hereinafter the number of shares in parentheses refers to the number after this 3 for 1 split.

3. Sources of Funds in the Trust Under the Plan.

Under the Plan, Trust funds come from the following sources:

1. Each participant is required to contribute annually one third of his compensation, defined as (a) the amount received by an employee of J. C. Penney Company under contract as a portion of the profits of the store managed by him, or (b) the amount received by a central or branch office employee as his or her share of the General Office Compensation Fund, as the case may be, exclusive of regular salary (R. 20).

2. The Company is required to contribute annually:

a. An amount equal to 2 per cent of the prior year's aggregate regular salary paid to all employees receiving compensation as defined in the Plan for all or any part of the respective year (R. 22).

b. An amount equal to 6 per cent of the Company's net profit for the prior calendar year as reflected by the books of the Company, in excess of 15 per cent of the common stock book value of the Company (R. 22).

3. Earnings of the Fund, including dividends on the Penney stock purchased by the Trustee (R. 24).

From the inception of the Plan until December 29, 1941, the amounts from these respective sources, to-

gether with their percentages of the total, were as follows (R. 137):

1. Participants' direct contributions	\$4,041,769.28 (65.0%)
2a. 2 per cent of aggregate regular salaries contribution	102,206.97 (1.6%)
b. 6 per cent profit-sharing contribution	371,931.56 (6.0%)
3. Earnings of funds, including dividends on Penney stock purchased by Trustee	<u>1,700,000.00 (27.4%)</u>
Total	\$6,215,907.81 (100.0%)

4. Funds Used to Repay Loan from Bank.

From the inception of the Plan until September, 1941, dividends received on the Penney stock held by the Trustee, together with the 2 per cent of aggregate of regular salaries contributions under Section 6 (a) for the year 1940 were used to cover the cost of the 50,000 (150,000) share block. Since September, 1941, dividends have been credited proportionately to participants' accounts while the 2 per cent of aggregate of regular salaries contributions under Section 6 (a) have been applied to the cost of the 150,000 (450,000) share block.

By December 29, 1941, using the funds contributed under the Plan set forth in the immediately preceding table, the loan from the bank was repaid in full.

On that date the participants had absolutely vested claims against the Trust funds totaling \$4,975,668.21. To satisfy these claims, the Trustee held \$389,565.61 in cash and the 200,000 shares of Penney stock.

As seen from the table on p. 8, *supra*, the direct contributions by participants during 1940 and 1941, during which time the loan used to purchase the stock was repaid, amounted to \$4,041,769.28 or 65 per cent of the receipts of the Trustee. The indispensability of these participant contributions in enabling the Trustee to borrow the necessary money from the bank to purchase the stock may be seen from the Company's "Explanatory Reference to Proposed Plan," paragraph "5", which indicates:

"Considering the compensation that should be paid in voluntarily by participants early in 1940 from their 1939 compensation and the dividends that would be paid to the Fund by the company on the 200,000 shares of stock during 1940, * * * it appears the collateral should be more than ample." (Exhibit 2)

"All dividends paid on the shares and all contributions made by the participants and the J. C. Penney Company, received by the Trustees, are to be applied on the principal and interest on the loan * * *." (Exhibit 79, memorandum of June 8, 1940, for J. I. H. Herbert, signed by Walter J. Cummings)

The Company itself assumed no liability with respect to the payment of the stock loan (R. 372), nor did it

guarantee its payment, nor did it execute a hold-harmless or indemnity agreement with the Trustee or with the Bank. (R. 375).

During this time when participants' funds were completely utilized for the payment of the loan used to purchase the shares, such funds were not available for other investments for the benefit of participants. This was clearly demonstrated in the case of Mr. McAlpine who retired on August 31, 1941, at the age of 68 years. He had personally contributed \$4,278.38 and had credits when leaving totaling \$4,635.05 (R. 162). When he received a check for this amount, he was puzzled why there had been no earnings on his credits, as this same amount had stood to the credit of his account 9 months earlier, December 31, 1940 (Exhibit 222 C). To his request for explanation, Company replied:

"I am indeed sorry but it appears to fall to me to give you disappointing information. The amount of the check which you received represents the full amount due you from the Fund. This results from the fact that the Fund to this point has had no monies for outside investment. In the early stages of the Plan all monies have had to be used to cover the purchase price of the 200,000 shares of J. C. Penney Company stock which was purchased by the Fund. Further, until the purchase price of the 50,000 share block is covered, all dividends received are applied to that cost. Further, the excess profit contribution by the company is an annual matter and does not apply to prior part-year participation. All this adds up to the fact that to this time no credit other than

reflected in the check submitted is available. This is all covered in the Plan booklet, which I realize may be difficult to understand." (Letter of Trown, Exhibit 222 D)

While the loan was being repaid during 1940 and 1941, the participants bore the entire risk in the event the bank foreclosed on the stock held by the Trustee. The Company risked nothing. *Trust Agreement, Paragraph Fourth (C), Exhibit 125 (R. 48)*:

"* * * if any or all of the stock pledged by the Trustee is sold by the creditor, there shall be no liability on the Trustee nor on the Company nor on any member of the Administrative Committee because of any loss to participants resulting from such sale."

Pre-Trial Order, Agreed Fact 40-a, (R. 137) shows the vast discrepancy between the credits absolutely vested in and due the participants and the cash held by the Trustee. For example, on the first day of the Plan, August 1, 1940, participants contributed directly from their earnings, on which they already had paid income tax, a total of \$1,575,000. That same day \$1,500,000 was paid on the loan, leaving a cash balance of only \$75,000 against which the participants' equity could not be satisfied were it not for the stock.

In the period from August 1, 1940, until the stock loan was fully repaid on December 29, 1941, the cash

balance dropped as low as \$13,360.41 (March 26, 1941), yet on that date participants had vested and absolute interests in receiving \$4,396,578.52 had they chosen voluntarily to withdraw, or if the Plan had failed for any other reason. During this period, the cash held by the Trustee seldom exceeded \$100,000. The only asset, therefore, which could satisfy the demands of all participants, had the Plan been terminated during this period, was the Trustee's equity in the stock, which equity did not become an unencumbered asset of the Trust until the loan was repaid on December 29, 1941.

5. Benefits Under the Plan Other Than Stock.

Each participant, regardless of the manner of separation from the Company, whether death, discharge, withdrawal or retirement under the Plan, was entitled to receive an annuity or cash consisting of the following amounts:

1. Total of his contributions.
2. A proportionate share of the 6 per cent profit-sharing contributions.
3. A proportionate share of the earnings of the Trust, including, commencing in September, 1951, dividends on the Penney stock held by the Trustee. (R. 28-32).

6. Stock Benefits.

In addition to the benefits received by all participants regardless of when or how they leave the Company, those participants who live to age 60 while still in the employ of the Company receive a number of shares of said Penney stock:

“without cost, from the 50,000 (150,000) share block of J. C. Penney Company common stock, that number of shares * * * represented by the proportion of 150,000 (450,000) shares that the participant's total contributions at the time of his or her retirement bear to the aggregate of such contributions of all participants in the Fund at such time * * *

“When the 50,000 (150,000) share block of stock is exhausted, distribution on retirement shall be from the 150,000 (450,000) share block, based on the proportion of the remaining shares that the retiring participant's total contributions at the time of his or her retirement bear to the aggregate contributions of all participants at such time.” (R. 29).

The 50,000 (150,000) share block was, projecting previous experience, exhausted in 1955. Stock awards from that time on therefore become less and less regardless of the fact that a participant's ratio under the formula is the same or higher than those retiring prior to 1955.

Although the Penney officials had “studied Plan after Plan,” the stock feature was unique, not found in any other Plan (Hughes, R. 360, 370). It will be shown in detail in this brief, *infra* pp 20-7, how use of the

formula for awarding stock produces increased stock benefits to participants by virtue of the predecease, discharge or withdrawal of fellow participants.

7. Present Action Attacks Plan Only as it Relates to Stock.

On July 11, 1951, appellant Harvey L. Wells, the former manager of the Corvallis, Oregon, store of appellee J. C. Penney Company, and appellant Harry J. Albertsen, the former manager of East Los Angeles Store No. 925 of appellee J. C. Penney Company, instituted this action on behalf of themselves and all *former* participants (their beneficiaries, heirs and legal representatives) who died or otherwise failed to reach retirement status under the Plan but whose contributions and earnings were used by the Trustee to purchase shares of J. C. Penney stock for the Trust.

This action seeks to adjudge (1) that the Plan, in so far as it relates to these shares of Penney stock, constitutes a wagering scheme, lottery or tontine contract in violation of New York law and public policy and (2) that the Trust as to said shares is illegal, void and of no effect. Appellants ask that said shares of Penney stock be held in a resulting trust for the benefit of appellants and other participants, former and present, in proportion as their contributions and earnings were used for the purchase of such stock.

8. Applicability of New York Law.

The Plan and Trust are to be construed in accordance with the laws of the State of New York (R. 178).

QUESTIONS PRESENTED

1. Is the method for awarding stock as set forth in the Plan and Trust Agreement illegal and void because participants benefit from the predecease, discharge and withdrawal of fellow participants in whom they have no insurable interest?

2. Does the method for awarding stock as set forth in the Plan and Trust Agreement violate New York Constitutional and statutory prohibitions against lotteries and wagering contracts?

3. If the method for awarding stock is illegal and void, does the trustee hold the stock upon a resulting trust for those whose contributions and earnings were used to purchase the stock?

SPECIFICATIONS OF ERROR

1. The District Court erred in failing to find that the Plan and the Agreement of Trust provide benefits contingent on the predecease, discharge and withdrawal of participants.

2. The District Court erred in finding that the Plan was not unfair, discriminatory or illegal because older

employees, among them some members of Company's Board of Directors, who were among the first to qualify for retirement with stock, received a greater number of shares than younger and future employees will receive when they retire. This error is contained in the District Court's Finding of Fact No. 46 (R. 244) and Conclusion of Law No. 13 (R. 251).

3. The District Court erred in finding that the Plan, so far as it pertains to the shares of capital stock of Company, is not a wagering contract, lottery or tontine contract and does not violate the New York Constitution, statutes, laws and public policy prohibiting such contracts and schemes. This error is contained in the District Court's Findings of Fact No. 47 and 48 (R. 245) and Conclusions of Law No. 5, 6, 7, 8 and 10. (R. 250-1)

4. The District Court erred in admitting in evidence, over the objections of appellants, the testimony of Albert W. Hughes consisting of extrinsic evidence concerning the meaning of the Retirement Plan and Trust. Said testimony is contained in the transcript of proceedings (R. 360-367). On direct examination, counsel for appellees asked A. W. Hughes, President of Company "the reason why there was included in the profit-sharing retirement plan the provisions for stock being issued to participants who left on the retirement age" (R. 355). Objection was made by Mr. King, counsel for appellants, on the following grounds:

“If the Court please, I object to that as the plan is on exhibit in this case, Exhibit 125, and it is written. I do not think it is proper. There has been no issue raised in the contentions as to the understandings of it, and I think the plan is here, and, therefore, it improperly calls for evidence tending to vary the plan as adopted.

* * *

“* * * And that it is improper for this witness to attempt to vary the terms of the plan by oral testimony.

* * *

“* * * the contention was never included in this pre-trial order and it takes us by surprise here that they are making that contention. There was never anything advanced in the pre-trial order along this line, nothing in the contentions of law nor in the contentions of fact, and I understood that when you made and prepared a pre-trial order, that plaintiffs were entitled to rely on it. Now they come in here with a new contention that we do not know anything about, * * *.

* * *

“* * * that it is immaterial under any issues of fact or law in the present action, * * *

“* * * And may the objection go to the whole line without repeating the objection?

“THE COURT: Yes.” (R. 355-359)

The testimony admitted over these objections was to the effect that the stock award provisions were included in the Plan because of “sound business judgment” (R. 357) “done in good faith for a valid business purpose” (R. 357).

5. The District Court erred in failing to find that the Trust purported to be established under the Plan, so far as it pertains to the shares of capital stock of Company, was and is illegal and void and of no effect and in failing to adjudge and decree that the Trustee holds the shares of stock of Company under a resulting trust in favor of appellants and those for whom appellants prosecute this action. This error is contained in the District Court's Conclusions of Law No. 16, 17, 18, 20 and 21 (R. 252-4).

6. The District Court erred in determining that the stock portion of the Retirement Plan is unseverable from the remaining portions of the Plan. This error is contained in the District Court's Findings of Fact No. 43 and 44 (R. 243) and Conclusion of Law No. 9 (R. 251)

7. The District Court erred in finding that it would be highly inequitable to permit appellants to recover in this proceeding on their own behalf and on behalf of the class for which they are suing. This error is contained in the District Court's Finding of Fact No. 58 (R. 249) and Conclusion of Law No. 19. (R. 253)

8. The District Court erred in failing to award appellants compensation for the reasonable value of the services of their attorneys in the prosecution of this action and for their costs and disbursements incurred herein, and in failing to decree that the sum so awarded should constitute a lien upon the shares of stock found

by the court to have been acquired by the contributions and earnings of appellants and those for whom they prosecuted this action.

SUMMARY OF ARGUMENT

I. THE PROVISION OF THE PLAN AND TRUST AGREEMENT FOR THE AWARD OF STOCK IS ILLEGAL AND VOID.

A. The Award of Stock is Contingent on the Lives and Continued Employment of Participants Contrary to New York law and Public Policy.

1. The stock scheme is a tontine contract involving wagers on the lives of fellow participants in violation of New York law.

2. The method for awarding the stock purchased with the contributions and earnings of participants violates New York constitutional and statutory prohibitions against wagering contracts and lotteries.

B. The Nature of the Scheme for Awarding Stock, not the Alleged Good Intentions of the Sponsors, Determines Whether or not it Constitutes a Tontine Contract, Wagering Contract or Lottery.

II. THE TRUSTEE HOLDS THE SHARES OF STOCK UNDER A RESULTING TRUST FOR THOSE WHOSE CONTRIBUTIONS AND EARNINGS WERE USED IN THEIR PURCHASE.

A. The Assets of a Trust, or any Part Thereof, Which is Illegal and Void, are Held in a Resulting Trust for Those who Contributed to the Trust.

B. The Stock was Purchased With the Contributions and Earnings of Those Persons who were Participants in the Plan During 1940 and 1941.

ARGUMENT**I. THE PROVISION OF THE PLAN AND TRUST AGREEMENT FOR THE AWARD OF THE STOCK IS ILLEGAL AND VOID.***A. The Award of Stock is Contingent on the Lives and Continued Employment of Participants Contrary to New York law and Public Policy.*

The District Court failed and refused to find as a fact that the Plan and Agreement of Trust provide benefits contingent on the predecease, discharge and withdrawal of participants. On the other hand, the District Court did not make any finding to the contrary. The failure of the court below to make any finding on this issue is the subject of Appellants' Specification of Error 1.

Calculation of Stock Benefits. As set forth previously supra, p. 13, the amount of stock awarded each retiring participant is determined by a ratio which that participant's credits bear to the credits of all participants when applied to the larger block of 150,000 (450,000) shares. The larger block was to remain intact until the smaller block of 50,000 (150,000) shares was exhausted, after which time awards are made directly from the larger block. Thus, those retiring while there are shares still remaining in the smaller block have their ratio measured against the undiminished 150,000 (450,000) share block. Once the smaller block is depleted, how-

ever, each participant's ratio is applied to whatever stock remains in the larger block, which block decreases each year to the extent that stock is awarded to retiring participants. In 1953 there were only 11,251 (33,754) shares remaining out of the smaller block. (R. 138) Projecting the retirement experiences of 1951, 1952 and 1953, this smaller block was exhausted in July, 1955. All subsequent awards of stock therefore will be measured against the ever diminishing larger block.

The number of shares awarded a retiring participant is determined by a formula consisting of two factors, a multiplier (a fraction of which the numerator is the participant's total contributions to date and the denominator is the aggregate of the "contributions of all participants in the Fund *at such time*") and a *multiplicand* (the number of shares at that moment remaining in the 150,000 (450,000) share block):

Multiplier		Multiplicand		
<i>Participant's Contributions</i>		150,000 (450,000)		
<u>Contributions of all participants in Plan at the moment</u>	X	or as much as is remaining in the larger block of shares at the time	=	Number of shares awarded

Effect of Death, Discharge or Withdrawal. The death, discharge or voluntary withdrawal of any participant benefits the remaining participants in two ways:

(1) A participant benefits by the predecease, discharge or withdrawal of any participant who is the same age as he or younger than he. This is due to the effect upon the multiplier by which his stock award is determined upon retirement. The denominator of the fraction is decreased by the predecease, discharge or withdrawal of the participants who are the same age or younger. Consequently, the multiplier and thus the number of shares awarded the retiring participant is increased.

(2) Moreover, a participant benefits from the predecease, discharge or voluntary withdrawal of any older participant. The predecease, discharge or withdrawal of the older participant increases the number of shares awarded to his surviving younger participants by delaying the extent to which and the time at which the 150,000 (450,000) share block of stock by which the awards are measured is reduced. Deaths, discharges and withdrawals of participants prior to the exhaustion of the 50,000 (150,000) share block served to postpone until 1955 the time when invasion of the 150,000 (450,000) share block commenced. Of the 943 participants who left the Plan by reason of death, discharge

or withdrawal up to 1953, a large number would have retired prior to 1955. Now that the 150,000 (450,000) share block diminishes annually with each award of stock, such deaths, discharges and withdrawals slow the rate of depletion of the stock held by the Trustee.

Examples will illustrate the significant increases in stock awards made to surviving participants by reason of the predecease, discharge and withdrawal of fellow participants. Fifty men retired with stock awards in 1945. Seventeen members of the class of 1945 (who for purposes of retirement under the Plan were the same age as the 50) did not "graduate" (retire with stock awards), 6 of them because of death: B. G. Huse, F. M. Beamer, Chas. Ehler, H. L. Hoagland, M. B. Warner and G. C. Taylor (R. 162). These six men died between May, 1943, and February, 1945, and their actual contributions up to the date of their respective deaths totaled \$120,393.94.

When Mr. Herbert (Third Vice-President and Treasurer of Company, R. 99) retired in 1945, he received 830 (2,490) shares of stock. This number was arrived at by ascertaining Mr. Herbert's ratio of contributions to the aggregate of contributions and applying that ratio to the 150,000 (450,000) share block:

$$\begin{array}{rcl} \$ & 86,133.73 & \text{(Exhibit 67)} \\ \hline & 15,563,428.63 & \text{(R. 140)} \end{array}$$

This ratio equaled .0055343 (Exhibit 67). When applied to 150,000 (450,000) shares, this ratio indicated 830 (2,490) shares due Mr. Herbert.

Had the 6 men named above not died, the denominator would have been increased by at least \$120,393.94, the total amount contributed by these 6 up to their respective deaths. Mr. Herbert's ratio, therefore, would have been calculated as follows:

$$\frac{\$ 86,133.73}{15,683,822.57} = .0054929$$

Applying this ratio to 150,000 (450,000) shares, Mr. Herbert would have received only 824 (2,472) shares. (Had these 6 men not died, their contributions from their dates of death until July, 1945, would have continued and increased the denominator even more than \$120,393.94, proportionately *decreasing* Mr. Herbert's stock award.) Disregarding that, however, it is certain that Mr. Herbert received 6 (18) of his shares directly because of the death of these 6 men.

The deaths of these 6 men benefited not only Mr. Herbert but also increased the *ratios* and therefore the numbers of shares received by each of the other of the 50 men retiring in 1945; for these 6 were the same age as the 50, at least for purposes of retirement. Such deaths also benefited the dividend accounts of these 50, to the extent that their increased ratios entitled

them to more dividends prior to retirement than otherwise would have been the case (R. 24, 28, 30).

The decease of these 6 before retirement also benefited younger participants by slowing the depletion of the stock corpus. These 6 men in the aggregate would have been entitled to *at least* 1,152 (3,456) shares, had they lived until 1945, on the basis of contributions already made up to their deaths. (Had they not died, of course, their aggregate numerator would have been proportionately larger):

$$\frac{\$ 120,393.94}{15,683,822.57} = .007679$$

$$.007679 \times 150,000 (450,000) = 1,152 (3,456)$$

By failing to live until retirement, these 6 men, who would have consumed 1,152 (3,456) shares, over 2 per cent of the 50,000 (150,000) share block, had they lived, delayed the time when the multiplicand—the 150,000 (450,000) share block—would commence to be diminished. When the startling effect of the deaths of these 6 men is analyzed and it is remembered that up to 1953, 943 men have withdrawn from the Company, 102 of whom because of death (R. 167), the increased awards to surviving participants are obviously substantial.

Another illustration graphically demonstrates how a participant's stock award increases significantly by

the predecease of fellow participants. Mr. Binzen (Executive Vice President, R. 102) and Mr. Hughes (President, R. 102) made identical contributions to the Plan from its inception until Mr. Binzen's retirement in 1950. Mr. Hughes, a year younger than Mr. Binzen, did not reach retirement age until 1951. If Mr. Hughes had died the first part of 1950, this *necessarily* would have increased Mr. Binzen's stock benefits, illustrated as follows:

Personal contributions in the Fund on July 1, 1950, were \$25,559,056.54 (R. 140), including Mr. Binzen's and Mr. Hughes' contributions for the eleven years, 1939 through 1949, of \$157,867.08 each (R. 150). Because Mr. Hughes was living when Mr. Binzen retired with stock in July, 1950, Mr. Binzen's stock benefits were determined as follows:

$$\frac{\$ 157,867.08}{25,559,056.54} = .0061766$$

$$.0061766 \times (450,000) = (2,779) \text{ shares}$$

Had Mr. Hughes died in early 1950, the denominator of the above ratio would have been reduced to the extent of Mr. Hughes' contributions of \$157,867.08, leaving a balance of \$25,401,189.46. Mr. Binzen's stock benefits would have been determined as follows:

$$\frac{\$ 157,867.08}{25,401,189.46} = .006215$$

$$.006215 \times (450,000) = (2,797)$$

Thus, had Mr. Hughes predeceased Mr. Binzen, the latter would have gained (18) shares from his death alone!

Participation by Executive Group. Such substantial increases in stock awards resulted not only from the premature deaths of participants but also from discharges and withdrawals of participants prior to age 60. This is important in view of the fact that no participant in the Plan had any right to continued employment with the Company. Any participant could be discharged without cause and thereby be deprived of his eligibility for retirement with stock (R. 177, 178). Since the Plan has been in operation, the groups of men with the power and opportunity to discharge any participant in the Plan, or influence such discharge, were composed predominantly of persons who were themselves participants and who stood to gain from the discharge of other participants prior to their reaching retirement status. From 1939 until 1951, all the positions on the various governing groups of the Company and Plan were filled by 19 men, of whom 14 were participants in the Plan (R. 98-105, 150). At the end of 1951, except for Mr. Trown (Comptroller R. 104), who left the Company voluntarily, 6 of these 14 had retired with stock and 7 were still participants in the Plan.

Not only did these men at all times possess unlimited and arbitrary power over the employment of every

participant, but they had power to permit optional retirements to persons in certain age groups (R. 25-26). No such early retirements with stock were permitted, thereby retaining in the Trust shares which might have gone to those eligible if permission had been granted. Seven participants set the determined policy of no early retirements with stock, 5 of which 7 themselves retired with stock between 1945 and 1951; Herbert, Ross Reynolds, Binzen and Hughes (R. 151, 153, 157, 150).

This power to cut down stock awards either by discharging participants before age 60 or by refusing all requests for optional retirement at earlier ages is important *not because such power may have been improperly exercised* but because it placed such persons in a position in which their duties to participants conflicted with their self-interest or with their interest in the Company. In order to appreciate the magnitude of this conflict of interest, it must be realized that these men who held this power stood to benefit on the average from 6 to 8 times as much as other participants from the predecease, discharge or withdrawal of participants. Four exhibits confirm this fact:

(1) Exhibit 67 shows that on July 1, 1945, 50 men retired, including Mr. Herbert and Mr. Ross. The other 48 retired with an average stock allocation of (345) shares each (allowing for the 3 for 1 split). However,

Mr. Herbert and Mr. Ross took (2,490) and (2,409) shares respectively, approximately 7 times the average of the other participants, and about (900) shares more than the highest participant other than themselves.

(2) Exhibit 69 shows that on July 1, 1947, 16 men retired, including Mr. Reynolds. The other 15 retired with an average stock allocation of (430) shares each. However, Mr. Reynolds took (2,717) shares, over 16 times the average of the other participants, and almost (1,000) shares more than the highest participant other than himself.

(3) Exhibit 72 shows that on July 1, 1950, 30 men retired, including Mr. Binzen. The other 29 retired with an average stock allocation of (338) shares each. However, Mr. Binzen took (2,779) shares, over 8 times the average of the other participants, and two and a half times or (1,669) shares more than the highest participant other than himself.

(4) Exhibit 73 shows that on July 1, 1951, 35 men retired, including Mr. Hughes. The other 34 retired with an average stock allocation of (365) shares each. However, Mr. Hughes took (2,755) shares, over seven and a half times the average of the other participants and about (900) shares more than the highest participant other than himself.

These 5 men, who together constituted but .17 per cent of the 2,906 participants in the Plan during 1940-

1951, have already personally received 2.2 per cent of *all* the Penney stock purchased by the Trustee. As the above exhibits showed, the predecease, discharge and withdrawal of participants prior to the retirements of these men increased their stock awards in this same disproportion.

The stock was bought with a loan paid off by the contributions and earnings of participants during the first two years, 1940-1941. Amounts of stock awarded depend not only on the survival of the retiring participants to age 60 while remaining in the employ of the Company but also upon the predecease, discharge or withdrawal of fellow participants. The more fellow participants who die, are discharged or withdraw from the Company before age 60, the greater the stock awards to their survivors. The inequity involved in awarding to surviving participants greater amounts of shares was recognized by the federal court in New York in considering a bonus plan.

Winkelman v. General Motors Corp. (S.D. N.Y., 1942)
44 F. Supp. 960, 1005

In 1917, with the approval of its stockholders, General Motors Corporation adopted a bonus plan whereby an executive was awarded as his bonus for a certain year a number of shares of stock, one fourth of which

was immediately delivered to him, and one fourth during each of the three succeeding years, with the provision that if such executive left the employ of the company he forfeited any undelivered stock and the same reverted to the corporation. The directors amended the plan so that the forfeited stock reverted to the Bonus Fund and was reawarded to the other participants. In holding in the present stockholders' suit that the directors were liable for the value of such stock the court stated on page 1005:

“* * * to bring into the bonus fund in which directors participated great blocks of forfeited stock, did not meet the standards set for these fiduciaries in the exercise of their power of amendment.

* * *

“A large part of the reawarded forfeited bonus stock had been part of a bonus award made several years prior thereto. The men who originally received the award were given their share of the 10% net earnings which they had helped to create. Those who received the forfeited bonus stock, when it was later reawarded, either had nothing to do with the creation of the earnings in the year for which the bonus stock had been awarded, or if they did contribute to those earnings they had received their proper share thereof in the bonus awarded to them for that year. There does not appear to be any equitable basis for this amendment of the bonus plan.”

Here, the method of awarding Penney stock to surviving participants similarly has no relation to the earn-

ings of the retiring participants. It is this method that is condemned by New York law and public policy.

1. The stock scheme is a tontine contract involving wagers on the lives of fellow participants in violation of New York law.

Specification of Error 2 concerns the lower court's finding and conclusion that the gradual diminution of stock benefits for participants retiring after 1955 is sound. Specification of Error 3 attacks the District Court's findings and conclusions that the Plan for awarding stock is not a wagering contract, lottery or tontine contract and does not violate the New York constitution, statutes, laws and public policies prohibiting such contracts and schemes. The determination of the legality of the provisions in the Plan and Trust Agreement for the awarding of stock is a question of law regardless of whether the District Court's determinations in that regard are denominated findings of fact or conclusions of law.

Prohibitions against wagers on the lives of others are of long established precedent in New York.

Ruse v. Mutual Ben. Life Ins. Co. (1861) 23 N.Y. 516, motion for reargument denied (1862) 24 N.Y. 653

Only where there exists an "insurable interest," as defined by law, are retirement benefits contingent on the lives of others permitted.

New York Insurance Law, Section 146.

“1. * * * no person shall procure or cause to be procured, directly or by assignment or otherwise any contract of insurance upon the person of another unless the benefits under such contract are payable to the person insured or his personal representatives, or to a person having, at the time when such contract is made, an insurable interest in the person insured. * * *

“2. The term, ‘insurable interest’, as used in this section, shall mean: (a) in the case of persons related closely by blood or by law, a substantial interest engendered by love and affection; and (b) in the case of other persons, a lawful and substantial economic interest in having the life, health or bodily safety of the person insured continue, as distinguished from an interest which would arise only by or would be enhanced in value by, the death, disablement or injury, as the case may be, of the person insured.”

New York Insurance Law, Section 200 (5)

“Such * * * [retirement system] contract shall conform to the provisions of this section and, in so far as practicable, to the other provisions of this chapter applicable to similar policies or contracts.”

Where persons stand to benefit from the predecease of others in whom they have no insurable interest, the laws and public policy of New York are violated. For this reason schemes which provide for accumulations to be awarded survivors of a group are illegal and void

in many states, including New York. Such accumulations to be awarded survivors are known as "tontines." Tontine accumulations have an effect completely opposite from that of regular life insurance. Regular life insurance is designed to compensate persons for the loss or casualty of one in whom they have an insurable interest. Tontine benefits, on the other hand, do not accrue to compensate those who suffer any loss from the death of another. Instead they provide a windfall prize to someone lucky enough to survive other persons whose deaths have no adverse effects on the survivor. Indeed, the fortunate survivor benefits, while losing nothing, from such deaths.

Walker v. Walbridge (1934) 151 Misc. 329, 271 N.Y.S. 473

Defendant subscribed to a contract furnished by a life insurance agent whereby not more than 100 persons bound themselves to take out life insurance on their own lives, all designating the same trust company as beneficiary-trustee of the policies. By the terms of the contract each policyholder agreed to maintain his insurance in force for at least five years. If, during that period, a policyholder should die, under the contract 25 per cent of the face amount of the policy was to be distributed by the trustee to the surviving policyholders according to the proportion which their first-

year premiums bore to total first-year premiums. The remaining 75 per cent of the face amount was to be distributed to beneficiaries designated by the policyholder. The contract was to expire after five years.

As part of the consideration due by the terms of the contract, defendant made a note payable to C. W. Colgrove System, Inc., the predecessor in interest of the plaintiff. In an action brought on the note, plaintiff moved for judgment on the pleadings. In denying plaintiff's motion and dismissing the complaint, the court stated on pages 480 to 482:

“By his defenses the defendant claims that the contract was at the time of its execution and delivery and now is a wagering contract, and therefore the note on which suit is brought is illegal and void as being given in violation of public policy. The purported indebtedness covered by such note and described in the contract was a premium of insurance on the life of the defendant herein which insurance was issued by the Union Central Life Insurance Company in the amount of \$100,000. The contract has been passed on by the Supreme Court of the State of Illinois. *Colgrove v. Lowe*, 343 Ill. 360, 175 N.E. 569. That learned court held that a similar agreement was null and void because it was a wagering contract and contrary to public policy of that state. The Supreme Court of Illinois did not pass on the validity of the insurance issued in connection with such contract nor on the enforceability of indebtedness for the premium of such insurance. In order to dispose of these motions, it is necessary that this court pass on the legality of the insurance, the contract, and the note.

“The principal ground on which the transaction, of which the insurance policy, the contract, and the note were a part, is attacked as a gambling transaction is that the ninety-nine persons who are named as possible beneficiaries of the policy have no insurable interest in the life of the defendant herein and the insured named in such policy and contract. It is well-settled law that, if the beneficiary named in a policy has no insurable interest in the life of the person insured, then the transaction is a wagering one and void as against public policy, unless the insured has selected such beneficiary. *Reed v. Provident Sav. Life Assurance Society et al.*, 190 N. Y. 111, 82 N. E. 734. * * * In the case at bar, the beneficiaries are not selected by the insured, but may be any ninety-nine other persons who desire to gamble on the length of the lives of themselves and their associates, including the defendant herein. Thus we have a case where any one of these ninety-nine persons, evilly minded, would have an incentive to shorten the life or lives of some or all others of the one hundred insured so that the person so inclined could benefit under the one hundred policies. It is in view of situations akin to this that the courts have declared it against public policy to insure the life of a person for the benefit of some one who has no insurable interest and who is not selected by the insured with caution for his own safety. * * *

“Applying these tests as to what is insurable interest, this court comes to the conclusion that the other ninety-nine persons of the one hundred persons referred to in the contract and made the beneficiaries of the policy have no insurable interest in the life of defendant herein and he has no insurable interest in their lives, and therefore the transaction which included such policy and contract is void as being part of a wagering contract and against public policy.”

Colgrove v. Lowe (1931) 343 Ill. 360, 175 N.E. 569,
certiorari denied (1931) 284 U.S. 639, 76 L. Ed.
544

In this case, cited with approval by the New York court, complainants filed a bill to restrain Lowe and others from revoking Colgrove's license to act as an insurance agent and from interfering with the "Colgrove" system used in the sale of life insurance policies. (This system is set forth in *Walker v. Walbridge*, supra, p. 34). In affirming the dismissal of the bill on the ground that the contract was void as against public policy, the court stated on pages 571 and 572:

"The inducement or consideration held out to the applicant for life insurance by this method is the chance to profit, if he lives, by the early death of one or more of the other ninety-nine contracting parties, in whose lives he cannot possibly have any insurable interest. A direct financial gain is anticipated by the application of part of the insurance carried by the members who die to help reduce the premiums on the insurance carried by those who live. The applicant thus expresses his willingness to forfeit 25 per cent of the insurance money which would otherwise be paid to his own beneficiaries if he died during the first five years, for what he thinks is a better chance to live during this five-year period and participate in some of the death dividends of his contemporaries. This is nothing but speculation in human life and as such the contract is void as a wagering contract. The very basis of the scheme is a wager for personal profit—an opportunity to speculate on one's chances of outliving the other members. The trust fund created by the death of any of the contracting parties is a sum of

money of which the trust company is the stakeholder, under an agreement to divide the sum among the winners, who are to be determined by the chances of life. The different contracting parties have no insurable interest in the lives of one another, and to allow them to benefit by the death of others of their number is to allow them to do indirectly by a contract what they are not allowed to do directly. * * *

“The contract under consideration is a wager upon the lives of others in whom the parties to be benefited have no insurable interest, and the use of such a contract to promote the sale of life insurance presents an appeal to the gambling instincts of prospective policyholders that is contrary to sound principles of public policy.”

Benefits contingent on the lives of others, declared the court, have long been condemned.

(pp. 571-572)

“Mr. Justice Holmes in the case of *Grigsby v. Russell*, 22 U. S. 149, 32 S. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863, said: ‘The very meaning of an insurable interest is an interest in having the life continue. * * * Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming.’ * * *

“* * * the language in the case first cited, as above quoted [*Warnock v. Davis*, 104 U.S. 775, 26 L. Ed. 924], remains unchallenged in its general definitions of pecuniary interest and wagering contracts and is especially applicable to the contract we are now considering. Referring again to the language in *Grigsby v. Russell*, *supra*, it correctly

expresses our view that the principal objection to the contract used in the Colgrove system is not so much that it offers a temptation to commit crime as that it is an inducement to speculate and gamble in human life, in which the participants occupy a position directly opposite to that of life insurance companies, all of which are primarily interested in the continued life of each policyholder."

Knott v. State (1939) 136 Fla 184, 186 So. 788, 121 A.L.R. 715

Knott, the State Treasurer, issued to the realtor a certificate authorizing it to do business in Florida but prohibiting it from issuing a certain policy containing tontine benefits. Realtor unsuccessfully sought a writ of mandamus to compel Knott to delete said prohibition from the certificate. The court held that the prohibited contract constituted a wagering scheme and, as such, was void as against public policy.

The prohibited contract provided for paying each insured \$1,000 at age 70 or the same amount to insured's named beneficiary if the insured died earlier. In addition, insured was to receive upon the death of each policyholder of his age who was insured in the same year a portion of the face value of such policy according to the ratio which the face value of insured's policy bore to the total of all policies in his class.

In this case the class consisted of those in a particular age group. Similarly, in the Penney Plan, each class

consists of those who reach age 60 in the same year. The Penney scheme differs, however, in that the deaths of all participants, whether or not in the same "class" and regardless of when they join the Plan, benefit their survivors. The evil in the Penney scheme is more widespread; for tontine benefits are not restricted to a single age group. Nevertheless, the contract involved in the Knott case was illegal. (pp. 789-790)

"* * * if all policy holders in the same class except one should die before reaching the age of seventy years the sole survivor would have received his proportionate share on each death and the beneficiary of the first to die would have received only the first allotment.

"We have examined the case discussed by counsel for the respective parties, *Colgrove v. Lowe*, 343 Ill. 360, 175 N. E. 569, and do not find where the policy there declared to be against public policy differs in principle from the one we are considering.
* * *

"Clearly, the holder of one of the policies of defendant in error would profit by the death of another in his class as did a contract holder under the Colgrove system, and it is plain, too, that here, as there, the one policy holder in the same group has no more interest in the continuance of the life of the others. * * *

"We think a wagering contract is against the public policy of the State of Florida * * * .

"* * * the 'Special Endowment Benefit' is a wagering contract, hence contrary to public policy in this State, * * * "

Fuller v. Metropolitan Life Ins. Co. (1898) 70 Conn. 647, 41 Atl. 4, 10, 15

In this suit the assignees of surviving policyholders claimed that defendant company had not given them the full amount of surpluses under their contracts. Each policy provided for a reserve dividend account which accumulated during the 10 year period from five sources: (1) ordinary dividends on existing policies, (2) accumulated dividend bequeathed to the class from dying participants, (3) accumulated dividends forfeited to the class by retiring participants, (4) reserves from all lapsing policies, and (5) compound interest on these forfeited funds.

Both the majority and concurring opinions agreed that the judgment should be set aside because of error in admitting the testimony of officials of defendant as to the meaning of the contract. Just as in the case of the Penney Plan, "The meaning and legal effect of the policy and of the document claimed as referred to by the policy was a question of law for the court" (41 Atl. at p. 15).

And, as to this question, the court indicated clearly the illegality of tontine contracts.

"Life insurance is protection given to one person against the damage he may suffer through the

death of another. A mere wager on the accident of death is void.

* * *

“All that distinguishes ordinary life insurance from a wagering contract is the theory of protection against damage that may be suffered through another’s death. This protection may be purchased by the insured in behalf of his own family, or of those he sees fit to make his beneficiaries. It may be purchased by one on his own account, where he may suffer damage from another’s death by reason of kinship, the relation of creditor, or other insurable interest. But when this element of protection is entirely eliminated, the insurance is a wager, and the contract is void. *Cronin v. Insurance Co. (R. I.)* 40 Atl. 497. In the present case the policy holders stipulate between themselves that the surrender value of each policy lapsing, which represents payments made in behalf of the beneficiary, shall go to benefit other policy holders living a certain time, who are total strangers to the policy and the insured. This is a mutual wager upon the chances of life. There is no conceivable element of protection. The sole purpose of the bet is personal profit. It is the risk of what is due to each in the case of a lapse for the chance of winning what is due to others. It is correctly described by the plaintiffs’ counsel as ‘the chance to speculate on his chances of surviving the other members.’ On this ground these policies were urged upon the public, by appeals to the gambling instinct, claiming, as stated in the Stewart pamphlet, that ‘risk is the condition of success.’ The only way to evading the invalidity of such a contract is by the claim that the policy holders in fact wager nothing; that all payments of premiums belong to the company, including those applied to maintain a reserve; and the policy holders are not entitled to any particular sum, but only

to an equitable proportion of the excess of assets over liabilities at the time of dividend. We do not pass upon the sufficiency of this claim. But, if the claim of the plaintiffs be true; if upon each lapse a sum equal in amount to the reserve value of the policy lapsing becomes a liability of the company, which it must pay to the surviving policy holders,—then all doubt as to the gaming nature of the transaction vanishes. The pool thus created is composed of definite sums of money of which the company is stakeholder under an agreement to divide these sums among the winners, who are to be determined by the chances of life.”

The concurring judges dissented from the “construction given” to the contract by the majority and felt that the appellate court should have granted plaintiffs a new trial. The majority, however, set aside the judgment without granting a new trial indicating that, because of the illegality of the contract, “If, therefore, the plaintiffs could maintain their claim, the result would be the dismissal of their complaint” (41 Atl. at p. 15).

United States Life Ins. Co. v. Spinks (1906) 29 Ky.L. 960, 96 S.W. 889, petition for rehearing overruled (1907) 126 Ky. 405, 103 S.W. 335, appeal dismissed (1908) 209 US 539, 52 L. Ed 917.

This case involved the legality under New York law of tontine accumulations, or “dividend additions.” In order to prevent forfeitures of the cash or reserve value of a life insurance policy upon failure of a policyholder to pay a premium, New York law has for many years

required the application of such reserve values to the purchase of paid up insurance, commencing from the time the policyholder fails in his obligations. In this case, the question was whether the defendant company was required, as to Mr. Spinks, to apply not only his "reserve" but his equitable share of the tontine accumulations. If so, the policy would have been in effect at his death, and the beneficiary, the insured's son, could recover thereunder. If not, the policy would have lapsed from nonpayment.

The lower court awarded plaintiff recovery under the "extended" policy, and the judgment was affirmed. Because the company was a mutual company, the court concluded the tontine surplus "should in equity go to those who had contributed it" (96 S.W. at p. 894). In so applying the proportionate share of the tontine accumulations "to those who had contributed," the court explained why distribution under the contract was improper.

"The original tontine contemplated that the total fund should go to the survivors of a class, regardless of the cause of their dropping out. When applied to insurance it seems to have an opposite effect from the real matter of insurance, the latter being to pay you if you die, the former to pay you if you do not. Tontine insurance, therefore, was an agreement to divide the 'surplus' which all of that class had contributed, among those who outlived the term agreed upon, and who persisted as paying members." (96 S.W. at p. 894)

In overruling the Company's petition for rehearing, the court looked beyond the technical meaning of terms to the inequities involved in tontine accumulations. The fact that tontines were, in this country, originated by Equitable of New York and adopted by New York Life and other leading companies did not save them from invalidity.

"But there was in 1879 and 1880, and had been for a decade or more previous, a crying evil in life insurance, which had aroused widespread bitter feeling, and had brought the management of insurance companies under severe criticism; and that was the unjust, unconscientious, inequitable practice of forfeiting the reserve, as well as accumulations of 'tontines' in event of a failure of the insured to pay each recurring premium. The bubble that had grown to the most noticeable proportions was that of the 'tontine' feature, a pure hazard. But many companies issued 'semitontine,' 'free tontine,' and other policies partaking more or less of the character of the pure tontine, which, as has already been pointed out, was not insurance at all, strictly speaking. Among those mentioned was 'deferred dividend' policies. They were, if you died before the period arrived for declaring the 'dividend' out of the 'surplus,' you got no part of the 'surplus'—that went to those who survived the 'period of distribution' * * *." (103 S.W. at p. 336)

The Penney Plan contains all the improper features of the tontine insurance schemes held invalid in all the above discussed cases. In addition to the impropriety of benefits accruing from the predecease of fellow par-

ticipants, the Penney Plan also permits increased benefits to accrue because of discharges and withdrawals of other participants. The motivation to benefit from the discharge or withdrawal from employment of fellow participants before age 60 is as contrary to public policy as the motivation to benefit from the predecease of another. The evil of the Penney Plan inheres in the *possibility* of such benefits accruing, not in any charge or proof that any improper conduct in this regard took place.

2. The method for awarding the stock purchased with the contributions and earnings of participants violates New York constitutional and statutory prohibitions against wagering contracts and lotteries.

The invalidity of the Penney Plan as a tontine contract just discussed arises from the application of the general policy against wagering schemes and lotteries as applied to the specific case of benefits contingent on the lives of others. A fortiori, the Plan violates the generic constitutional and statutory proscriptions against wagering contracts and lotteries. The lower court's determination that the Plan's stock award provisions does not violate such proscriptions is included in Specification of Error 3.

New York Constitution, Article 1 Section 9

“* * * no lottery * * * or any other kind of gambling, * * * shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.”

Pursuant to this constitutional command the New York Legislature has declared unlawful any stake which is awarded dependent upon any chance, casualty or unknown or contingent event.

New York Penal Law, Section 991

“All * * * stakes, made to depend * * * upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful.”

New York Penal Law, Section 992

“All contracts for or on account of any money or property, or thing in action * * * staked, as provided in the preceding section, shall be void.”

The Penney stock is by virtue of the method of distribution in the Plan staked to be distributed depending on the chances of death, discharge and withdrawal of participants. Such casualties, unknown or contingent events determine not only to whom such stock is distributed, but also the amounts awarded each retiring participant.

Wagering is the broad generic evil of which lotteries constitute a "form or species." Lotteries generally involve greater numbers of persons and require that each participant have paid a consideration for the chance to receive a prize.

State v. Schwemler (1936) 154 Or. 533, 60 P. (2d) 938

In addition to the broad wagering prohibitions, the legislature also specifically proscribed lotteries.

New York Penal Law, Section 1370

"A lottery is a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise or by some other name."

New York Penal Law, Section 1371

"A lottery is unlawful and a public nuisance."

New York Penal Law, Section 1386

"All contracts, agreements and securities given, made or executed, for or on account of any raffle, or distribution of any money, goods or things in action, so raffled for, or agreed to be distributed as aforesaid, shall be utterly void."

In so far as the Penney stock was purchased with the funds and earnings of participants during 1940 and

1941, consideration was paid for the property. In so far as such stock is distributed dependent upon the deaths, discharges and withdrawals of fellow participants, it is distributed according to chance.

The cases make it clear that these New York constitutional and statutory provisions are aimed at a generic evil and not some particular form of wagering or lottery.

Irving v. Britton (Com. Pleas, 1894) 8 Misc. 201, 28 N.Y.S. 529, 530

“Gambling is the mischief against which the prohibition of the constitution is leveled; and it is ‘the office of the judges to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief.’ *Magdalen College Case*, 11 Coke, 66b-79a; *Wilkinson v. Gill*, 74 N.Y. 63, 67. The language of the constitution is generic, not specific; not one species of lottery, but all lotteries, are proscribed * * *. So, in *Wilkinson v. Gill*, 74 N.Y. 63, of ‘any game or device of chance in the nature of a lottery,’ the chief judge saying that ‘the courts have uniformly looked beyond the mere form of the transaction and sought out and suppressed the substance itself.’”

At the trial counsel for defendants took the position that “the use [by the Trustee] of the contributions that came in from participants” was of no concern to participants who “would always be sure to get 100 per

cent of * * * [their] credits” when they left (Stone, R. 384-385) The cases have uniformly held, however, that a scheme is no less a lottery simply because participants are sure to receive back an amount equal to what they have paid.

Carl Co. v. Lennon et al (1914) 86 Misc. 255, 148 N.Y.S. 375, 376

Plaintiff, a clothing house, sold 500 small banks for 25 cents each upon a plan whereby the name of a purchaser was drawn each day and he became entitled to \$1 worth of goods. Although the court considered the appeal to gambling instincts to be negligible, and that the scheme of selling banks for 25 cents “attract[ed] people to the store with the certainty of getting \$1.25 worth of goods for 25 cents” (p. 377). Nevertheless, the scheme contained sufficient element of chance to be condemned as a lottery.

“Payment for the bank is a consideration for the right to participate in the benefits of the scheme, although the bank is worth the money paid for it. *Taylor v. Smetten*, 11 Q.B.D. 207.”

State ex rel Home Planners Depository v. Hughes (1923) 299 Mo. 529, 253 S.W. 229, 28 A.L.R. 1305

Relator was a trust which issued certificates requiring the holders thereof to pay \$4 monthly for each \$500

face value for a period not exceeding ten years. Certificate holders were eligible for loans, at 3 per cent interest, on real estate according to the time applications to secure certificates were signed. Those certificate holders who did not obtain loans and who completed their installments were entitled to receive back the amounts paid in plus a proportionate share of the profits. Despite this, the court quashed relator's alternative writ of mandamus to compel the commissioner of finance to license it, and held the scheme an illegal lottery. (253 SW at p. 230:

“The first question argued is whether relator's plan or scheme is a lottery, or in the nature of a lottery, within the meaning of § 10 of article 14 of the Constitution, which forbids the authorization of lotteries or gift enterprises for any purpose. The term ‘lottery,’ thus used, includes every device whereby anything of value is, for a consideration, allotted by chance. *State v. Becker*, 248 Mo. loc. cit. 560, 154 S. W. 769; *State v. Mumford*, 73 Mo. 647, 39 Am. Rep. 532; 17 R. C. L. p. 1222, § 10. Consideration, chance, prize — these are the elements. That relator's plan includes the first cannot be denied. The questions debated relate to the second and third. *The fact that each certificate holder eventually might or would receive an amount equal to the aggregate of his payments can make no difference if, in addition, each secured a chance for a prize.* *State v. Mumford*, supra; *State v. Lipkin*, 169 N. C. 265, L.R.A. 1915F, 1018, 84 S. E. loc. cit. 343, Ann. Cas. 1917D, 137. * * * The loans it agrees to make to its certificate holders are to bear 3 per cent interest. The right to such a loan is obviously a valuable right.” (Emphasis added)

Fitzsimmons v. United States (CCA 9, 1907) 156 Fed.
477

In holding a credit scheme to constitute an illegal lottery, the court stated on page 479:

“To constitute a prize, the inequality need not necessarily be great, and the element of prize may exist in a scheme so arranged as to return to each participant something of value, or even an equivalent for all that he pays in.”

Numerous other schemes have been subject to the lottery prohibitions regardless of the fact that participants were guaranteed a 100 per cent return in value for their contributions. Many such cases involved “suit clubs” in which participants made regular weekly payments until the full cost of a suit was paid. Each week, however, certain participants were entitled to receive their suits without further payment. Some paid for their suits in full, others obtained their suits after partial payments. Nevertheless, the schemes have been consistently held invalid.

Bills v. People (1945) 113 Colo. 326, 157 P. (2d)
139

People v. Hecht (1931) 119 Cal App 778, 3 P. (2d)
399

People v. Wassmus (1921) 214 Mich. 42, 182 N.W.
66

De Florin v. State (1905) 121 Ga. 593, 49 S.E. 699

The same scheme has been held illegal when used in the purchase of furniture,

State v. Emerson (1927) 318 Mo. 633, 1 S.W. (2d) 109

State v. Lipkin (1915) 169 N.C. 265, 84 S.E. 340

or when used in the purchase of jewelry.

People v. Bloom (1928) 222 App. Div. 451, 227 N.Y.S. 225, reversed on other grounds (1928) 248 N.Y. 582, 162 NE 533

In the Penney Plan the stock was the prize; the survival of participants with the Company until age 60, the chances, casualties, unknown and contingent events upon which stock awards depended, and the contributions and earnings of participants applied to liquidate the loan used to purchase the stock prize, the consideration.

B. The Nature of the Scheme for Awarding Stock, not the Alleged Good Intentions of the Sponsors, Determines Whether or not it Constitutes a Tontine Contract, Wagering Contract or Lottery.

Upon the trial, appellees sought to introduce, through the testimony of A. W. Hughes, President of the Company, evidence that the stock award provisions were included in the Plan because of "sound business judgment" (R. 357), "done in good faith for a valid

business purpose" (R. 357). The entire line of testimony was objected to by appellants (R. 355-9) on the grounds that it was an attempt to vary the written Plan and that it was immaterial to any issue raised in the pre-trial order. Counsel for appellees conceded that the illegality of the Plan, if any, could be determined from the Plan itself (R. 357).

Counsel for appellees then advanced the proposition that a scheme which "may be a lottery under certain circumstances is not a lottery if it was done in good faith for a valid business purpose" (R. 357) and that appellees "have a great deal of authority to support * * * [them] on that." (Young, R. 357) Because of this assurance that "there will be ample authority submitted to support that contention" (Young, R. 358) the court agreed to admit such evidence "provisionally" (R. 357) The admission and consideration of such evidence (R. 396) are the grounds of Specification of Error 4.

Subsequently, counsel for appellees referred to his assurance of authority that a "valid business purpose negatives the matter of a lottery" (Young, R. 393) and submitted the following authority:

12 Am. Jur. 744, Contracts, Section 224

"* * * there is a presumption in favor of the legality of an agreement, and although an agreement is illegal, if the illegality does not appear on

its face it must be proved by the person who asserts it. The rule is established that where a written instrument is attacked upon the ground that the agreement is offensive to law and violative of public policy the whole transaction should be inquired into, and the Court will not expect itself to be embarrassed by any technical rules regarding the admissibility of evidence." (R. 395)

Counsel for appellees failed, however, to read to the court the remaining sentence in that section of Am. Jur.:

"Where, however, a written agreement is plain and unambiguous and by its terms illegal, it has been said that parol evidence is not admissible for the purpose of purging the agreement of its illegality."

In the first place, even the truncated part cited by appellees is not relevant. The sentence of the citation that "the Court will not expect itself to be embarrassed by any technical rules regarding the admissibility of evidence" refers solely to an attempt to protect an illegal transaction from exposure by extrinsic evidence. The one case cited thereto states that proposition.

Kuhn v. Buhl (1916) 251 Pa. 348, 96 Atl. 977

In that case the person alleging the *illegality* was attempting by parol evidence to show illegal a transaction valid on its face. The other cases cited in the

same section of American Jurisprudence support the same obvious proposition, but not one case even suggests that any type contract invalid on its face may be saved by extrinsic evidence. Indeed, the cases concerning wagering contracts and lotteries hold quite the contrary; that the dominant purpose of a lottery scheme is a legitimate business one does not lessen its illegality.

Carl Co. v. Lennon (1914) 86 Misc. 255, 148 N.Y.S. 375, *supra*, p. 50

In this case the court held the scheme of selling banks for 25 cents a "harmless piece of advertising to attract people to the store with the certainty of getting \$1.25 worth of goods for 25 cents" (p. 377). Despite the fact that the court considered the appeal to gambling instincts to be negligible, and the scheme to involve "no ill effects," it was held to be a lottery.

People v. Lavin (1904) 179 N.Y. 164, 71 N.E. 753, 754, reversing (App. Div. 1904) 87 N.Y.S. 776

In this case the purchaser of a cigar was entitled, with the band, to compete for prizes. That the scheme had a dominant business purpose was declared irrelevant:

"But the prohibition and regulation of gambling in all forms and lotteries of every kind are unquestionably valid exercises of legislative power, and, if the scheme established by the advertiser was, in effect, a lottery, the fact that the dominant purpose

was merely to increase the advertiser's business does not save it from condemnation."

The fact that the Penney Plan stock feature was intended for the "interest of the Penney Company and all, every possible or prospective participant" (Hughes, R. 367) would not affect its identity as a wagering scheme. The very same claim, that a scheme for discounting furniture installment contracts was operated best to "help the company," has been held not to save it from condemnation as a lottery.

State v. Emerson (1927) 318 Mo. 663, 1 S.W. (2d) 109, *supra*, p. 53

In an early case a scheme in which penny candy was sold with numbers, the purchasers of which might be entitled to a prize, was struck down as a lottery despite its innocence of character and effect.

People v. Runge (1885) 3 N.Y. Crim. 85

Even the most worthy of causes will not justify gambling or lotteries. The firmness of this principle may be seen from a recent New York case concerning bingo.

People v. Kiefer (1940) 173 Misc. 300, 16 N.Y.S. (2d) 858

In this case the court refused to dismiss indictments of three men who operated a bingo game for the benefit

of the Society for the Prevention of Cruelty to Children in the county of Queens. Between 1,000 and 1,500 “decent residents * * * derived pleasure * * * for 25 cents, or slightly more” from a game, none of which was “harmful to any participant” nor “deprived anybody of any of the necessities of life” (p. 861).

The court’s personal attitude toward innocent bingo was clear:

“* * * I can foresee the Madison Square Garden Bowl in Queens County crowded with 60,000 people or more, once in the spring and again in the fall, participating in a monster bingo, the great proceeds of which could be beneficially used in providing iron lungs, oxygen tents and modern surgical equipment to the hospitals of our county, so that their patients could obtain surcease from their sufferings.”

Nevertheless, despite his reluctance, the court held:

“* * * that in every instance where a bingo is conducted those conducting the same are violating the law * * * .” (p. 862)

In this holding, the court was consistent with previous holdings of the court. Thus, a numbered ticket to a “grand concert,” entitling the holder to whatever gift would be awarded, was illegal, and the “worthiness and excellence of the charties, * * * [did] not remove the vice from the enterprise, or make it lawful and proper.”

Negley v. Devlin (1872) 12 Abb. Prac. (N.S.) 210,
212

The same reasoning was employed in holding illegal a scheme whereby members of an art group contributed \$5 and received a chance to win some pictures.

Alms House v. American Art Union (1852) 7 N.Y. 228

The same reasoning has also been applied to tontine insurance schemes which have been invalidated. In brushing aside all questions other than the nature of the scheme, courts have declared irrelevant the attitude and consent of participants and promoters (see *Fuller v. Metropolitan Life Ins. Co.*, supra, p. 41). The members of the governing group which devised the Penney Plan testified to their awareness of the hazard involved in not getting stock if they failed to continue with the Company until age 60. They further testified that they were willing to accept such contingencies (Schwamb, R. 273; Herbert, R. 275; Hughes, R. 302). Even though the chances assumed by these top men did not, of course, include the same hazards of discharge borne by the other participants, their willingness to assume the contingencies of death, though relevant to the fact that they were aware of the tontine features of the Plan when adopting it, is irrelevant to the question of whether or not the scheme is invalid.

State ex rel Attorney General v. Interstate Sav. Inv. Co. (1901) 64 Ohio St. 283, 60 N.E. 220, 231

“The question here is not whether the promoters of the defendant company have intentionally devised a scheme to mislead and defraud, but whether that is the effect of it. The promoters and the investors may be self-deluded or satisfied to take the chances offered, but that does not alter the character of the scheme. If the company is misusing its corporate privileges in such a way as to be a public abuse, the writ must issue, regardless of the intent.”

Even if the illegality of the Plan could not be ascertained from the Plan itself and extrinsic evidence were admissible, the uncommunicated retrospective self-serving declarations of Penny officials would in any event be irrelevant and inadmissible.

3 *Corbin on Contracts* 77-78, Section 543

“A party will not be permitted to build up his case by self-serving statements; they should be admissible against him, however, as admissions against his interest. They are admissible to aid in showing that he knew or had reason to know the meaning that the other party gave to the words of the contract.”

II. THE TRUSTEE HOLDS THE SHARES OF STOCK UNDER A RESULTING TRUST FOR THOSE WHOSE CONTRIBUTIONS AND EARNINGS WERE USED IN THEIR PURCHASE.

A. The Assets of a Trust, or any Part Thereof, Which is Illegal and Void, are Held in a Result-

ing Trust for Those who Contributed to the Trust.

When a trust, or any part thereof, is found to be illegal and void, the Trustee holds the assets in a resulting trust for those who contributed thereto. Specifications of Error 5 attacks the failure of the District Court to declare the shares of stock to be held by the Trustee under a resulting trust in favor of appellants. Specification of Error 7 challenges the District Court's conclusion that it would be inequitable for such stock to be distributed to those whose earnings and contributions were used for the purchase of said stock.

When assets have been illegally staked in a wagering contract or lottery, specific statutory provisions not only provide for but also encourage recovery by the contributors.

New York Penal Law, Section 994

"Any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not."

New York Penal Law, Section 1383

“Any person who shall have paid any money, or valuable thing, for a chance or interest in any raffle or distribution, prohibited by the preceding sections, may sue for and recover the same of the person to whom such payment or delivery was made.”

These statutes are remedial rather than penal, are construed liberally to permit recovery and have specifically eliminated the former defense of *in pari delicto*.

Galtrof v. Levy (1940) 174 Misc. 489, 21 N.Y.S. (2d) 455, motion to amend answer denied (1940) 174 Misc. 1004, 22 N.Y.S. 2d 374

Stuart v. Grattan (1926) 217 App. Div. 336, 216 N.Y.S. 727

Mendoza v. Levy (1904) 98 App. Div. 326, 90 N.Y.S. 748

The right of recovery is so strongly recognized that a bankrupt has been refused discharge because the trustee had failed to recover the losses from casual bets made by the bankrupt with a professional better.

Klein v. Morris Plan Industrial Bank of N.Y. (CCA 2, 1942) 132 F. (2d) 809

Recovery may be had even though the loser may have specifically consented to the payment by the stakeholder to the winner.

Ruckman v. Pitcher (1848) 1 N.Y. 392

“The evident intention of the legislature was to discourage and repress gaming in all its forms, including bets and every species of wager contracts of hazard, as a great public mischief, calling for effective measures of prevention and remedy.”

The policy permitting recovery of staked property is so strong that a person may recover even though his other “winnings” exceeded the losses for which recovery was claimed.

Watts v. Malatesta (1933) 262 N.Y. 80, 186 N.E. 210

Even a habitual gambler has been permitted to recover his losses.

Bamman v. Erickson (1942) 288 N.Y. 133, 41 N.E. (2d) 920, 922

“It [the law] does not treat alike the spider who spins the web and the fly enmeshed in it.”

This parable would seem highly appropriate to the present action. Appellants at no time from the inception of the Plan until their employment with the Company terminated had been advised of the illegality in this stock feature of the Plan (Wells, R. 310) (Albertsen, R. 318) (see also Mitchell, R. 338). Appellants, along with “every [other] manager on contract and every partici-

pant in the general office compensation plan had to either sign an acceptance card for the Plan or cease active continuance of the duty he had" (Hughes, R. 302).

In contrast, the Company officials who drafted and adopted the Plan were well aware of the hazards inherent in the Plan which constitute its illegal features. Not only were they fully aware of these aspects of the Plan, but willingly accepted the hazards involved (Schwamb, R. 273; Herbert, R. 275; Hughes, R. 302).

Apart from these statutory remedies, courts declare void provisions of a trust which violate public policy.

1 *Scott on Trusts* 376, Section 62

"There is a large and miscellaneous class of trusts which are held invalid on the ground that their enforcement would be against public policy, even though the enforcement does not involve any criminal or tortious act by the trustee. On the same ground a provision in the terms of the trust may be illegal, even though the trust itself does not fail for illegality."

54 *Am. Jur.* 38, *Trusts*, Section 21

Where the trust fails for such reasons, a resulting trust arises in favor of those who furnished the consideration for the creation of the trust.

3 *Scott on Trusts* 2204-2205, Section 422A

“Where an express trust fails a resulting trust arises in favor of the person who created the trust or his successors in interest. Who, then, is the person who creates the trust? Where an owner of property devises it or bequeaths it in trust, the testator is the creator of the trust, and if the trust fails a resulting trust arises in favor of his heirs or next of kin or residuary devisees or legatees. Where the owner of property gratuitously transfers it inter vivos upon a trust which fails, he is the creator of the trust and a resulting trust arises in his favor. The situation is different where consideration is paid for the transfer in trust. If the consideration is paid by the transferee, he is the creator of the trust, and if the trust fails he is entitled to hold the property free of trust. If a third person pays consideration for a transfer in trust, he is the creator of the trust, and if the trust fails a resulting trust arises in his favor.”

3 *Scott on Trusts* 2206-2207, Section 424

“Where an owner of property transfers it upon a trust which fails, and the consideration for the transfer was paid by a third person, a resulting trust arises not in favor of the transferor but in favor of the person who paid the consideration. In such a case the transferor is simply a vendor of the property. The person who pays the consideration being the real creator of the trust, there is a resulting trust in his favor on the failure of the trust.”

2 *A.L.I., Restatement, Trusts* 1311, Section 424

“Where the owner of property transfers it upon a trust which fails, and he receives from a third per-

son consideration for the transfer as an agreed exchange, there is a resulting trust in favor of the person who paid the consideration.”

1 *Bogert, Trusts and Trustees* 270, Section 41

1 *Perry on Trusts and Trustees* (6th Ed.) 239, Section 151

Paragraph Nineteenth of the Agreement of Trust (R. 72) provides that it shall be considered and enforced according to the laws of New York. A resulting trust of personal property is valid and enforceable under the laws of New York.

Coleman v. Mulligan (1945) 66 N.Y.S. (2d) 696, 697

2 *Bogert, Trusts and Trustees* 1435, Section 467

Cases dealing with illegal tontine accumulations have ordered pro rata distribution to those who contributed thereto.

United States Life Ins. Co. v. Spinks (1906) 29 Ky. L. 960, 96 S.W. 889, petition for rehearing overruled (1907) 126 Ky. 405, 103 S.W. 335, appeal dismissed (1908) 209 U.S. 539, 52 L Ed. 917 supra p. 43

In this case the court applied Mr. Spinks' equitable share of the tontine accumulations to extend his policy with paid-up insurance.

State ex rel Attorney General v. Interstate Savings Inv. Co. (1901) 64 Ohio St. 283, 60 N.E. 220, supra p. 60

After indicating that a tontine contract was an illegal lottery, the court stated (p. 233):

“It should be added, as the opinion of the whole court, that it is the duty of the state treasurer to hold and distribute the fund deposited with him in trust for the holders of the debentures in this state according to the amount that may be found due to each one.”

The Penney Plan is challenged in this action as to the stock provisions alone. A trust may be invalidated as to illegal provisions and upheld as to valid provisions, and courts will make such severance whenever possible.

3 *Scott on Trusts* 2177, Section 411.2

“A resulting trust arises not only where an intended trust fails altogether, but also where it fails in part. Where the intended trust fails in part, there is a resulting trust of so much of the property as is not appropriated to the part of the trust which does not fail.”

Hawthorne v. Smith (1937) 273 N.Y. 291, 7 N.E. (2d) 139

1 *Scott on Trusts* 405, Section 65.1

1 *A.L.I. Restatement of Trusts* 204, Section 65

1A *Bogert on Trusts* 315, Section 211

This failure may arise from illegality.

3 *Scott on Trusts* 2196, Section 422

A policy with a tontine feature may be invalidated as to that part without affecting the remaining valid portions.

Wheeler v. Mutual Reserve Fund Life Ass'n. (1902)
102 Ill. App. 48

In a very recent case involving a retirement pension plan, an illegal portion thereof was severed from the valid portions.

Ledwith v. Bankers Life Ins. Co. (1952) 156 Neb. 107,
54 N.W. (2d) 409, 417

In this case, policyholders of the defendant insurance company sued in equity to obtain an adjudication that a company retirement plan, insofar as it included officers, was illegal under Nebraska law, and that the amounts set aside therefor be held illegally appropriated and be restored.

The court discussed the statutes governing retirement plans and stressed the compensatory nature required of such plans.

“The retirement plan of the company and the benefits thereunder are a form of contingent deferred compensation for personal services of the em-

ployees and an integral part of the wage and salary structure of the company. The benefits provided by the plan constitute 'salary, compensation or emolument' as these terms are used in the statute. This is conceded by appellees. These characteristics of a retirement plan have been recognized and established by judicial decisions. *Inland Steel Co. v. National Labor Relations Board*, 7 Cir., 170 F. 2d 247, 251, 12 A.L.R. 2d 240, adopted and approved the ruling of the defendant board that: ‘“* * * the term ‘wages’ as used in Section 9 (a) [29 U.S.C.A. § 159 (a)] must be construed to include emoluments of value, like pension and insurance benefits * * *. Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure * * *.”’

In analyzing the statutes, the court concluded that officers of the insurance company were “not employees within the meaning of the statute authorizing the company to establish and administer a retirement plan for the benefit of its employees” (p. 419). The lower court had dismissed the complaint. The Supreme Court reversed with instructions to the lower court to invalidate the plan only to the extent that its provisions were illegal.

“The judgment should be and is reversed with directions to the district court of Lancaster County to render a judgment in this case as follows: That the retirement plan of the Bankers Life Insurance Company of Nebraska involved herein is, and has been at all times, unauthorized and invalid in the respect and to the extent that it provides that the

officers of the company are included in the plan and its benefits; that any provision thereof intended to bring any officer of the company within the coverage or benefits of the plan is, and has been since the adoption of it, invalid and such provision is vacated and annulled; that the retirement plan for the benefit of the employees of the company is legal and effective; and that appellees be directed and required to return, restore, and pay to the company and to the proper fund or funds thereof all assets and money set aside, appropriated, or expended for, or on account of, the retirement plan including cost and expense because of the inclusion of the officers of the company in the coverage of the plan." (p. 424)

Despite this authority, the District Court found that the stock provisions of the Penney Plan are unseverable from the remaining portions. This is challenged by Specification of Error 6. However, the illegality of the stock provisions inheres in the Plan, whether or not those provisions are separable. Therefore, assuming that the stock provisions are inseparable, the necessary result would be the termination of the entire Plan.

B. The Stock was Purchased With the Contributions and Earnings of those persons who were participants in the Plan during 1940 and 1941.

Previously it has been shown that the loan used to purchase the stock was fully repaid with the contributions and earnings of participants by December 29, 1941

(supra, pp. 8-12). At that time participants had absolutely vested claims against the Trust totaling \$4,975,668.21, while to satisfy these obligations the Trustee held only \$389,565.61 in cash and 200,000 shares of Penney stock, supra, p. 9.

The full extent of the interest in the stock held by the 1940-1941 participants may be appreciated most graphically by considering what would have happened had the Plan been terminated on December 29, 1941, when the stock became an unencumbered asset of the Trust. Article 24 of the Plan specifies that on termination the amount of credits due participants be determined (R. 36). These credits totaled \$4,975,668.21 on December 29, 1941, and were derived from the following sources:

Participants' direct contributions	
on which they paid income tax	\$4,041,769.28
Profit-sharing contribution under 6 (b)	371,931.56
Amount credited to dividend account	
after cost of 50,000 share block	
was covered (R. 138)	561,967.37
Total	<u>\$4,975,668.21</u>

Then the ratio which the market value of the Fund's assets (exclusive of the stock) bears to these credits must be determined. Those assets totaled \$389,565.61 in cash, and each participant on receiving his share of this cash would have received less than 8 cents for each

dollar to his credit. For the remaining 92 cents on the dollar, participants would have had to look to the stock.

Of the funds used to repay the loan, it has already been shown, *supra*, p. 8, 65 per cent were direct contributions by participants from earnings on which they had already paid income tax, 27.4 per cent were from earnings of the Fund, 6.0 per cent were from the profit-sharing contributions, and 1.6 per cent were from the 2 per cent aggregate salaries contributions. All these contributions constituted earnings of participants, including the profit-sharing contributions and the 2 per cent of aggregate salaries contributions.

Under New York law a corporation may not pay bonuses or pensions to employees over the protest of any shareholder (60,561 shares were voted against the Penney Plan, Exhibit 1) unless such payments constitute compensation in relation to services rendered.

Diamond v. Davis (N.Y. Supreme Ct., 1942) 38 N.Y.S. (2d) 103, 113; affirmed (1944) 292 N.Y. 552, 54 N.E. (2d) 683; also (N.Y. Supreme Ct., 1945) 62 N.Y.S. (2d) 181

Gallin v. National City Bank (1934) 152 Misc. 679, 273 N.Y.S. 87; (1935) 155 Misc. 880, 281 N.Y.S. 795

Rogers v. Hill (1933) 289 U.S. 582, 77 L. Ed. 1385

Employer contributions to bonus or pension plans are upheld only when constituting reasonable compensation to the beneficiaries.

Parsil v. Onyx Hosiery, Inc. (1927) 220 App. Div. 148, 221 N.Y.S. 174, affirmed (1927) 246 N.Y. 559, 159 N.E. 651

Fogelson v. American Woolen Co. (C.A. 2, 1948) 170 F. (2d) 660

J. C. Penney Company is incorporated in the state of Delaware (R. 92) and its corporate powers are governed by the laws of that state. Under Delaware law, a majority of stockholders may neither authorize nor ratify a corporation's making *gifts* to a pension plan. Contributions to a pension plan, in the absence of unanimous stockholder consent, are limited to those which constitute reasonable compensation to participants.

Nemser v. Aviation Corp. (D. Del., 1942) 47 F. Supp. 515

The Retirement Plan was expressly devised as a substitute for previous sales of "expansion stock" and "partnership" arrangements prior to that (Exhibits 2 and 55). The Retirement Plan differed from the profit-sharing aspects of participants' regular compensation in giving manager-participants an interest in the wel-

fare of the entire Company, rather than in one store only (R. 362). The stock feature was "set * * * up as an incentive so that a man would strive constantly, particularly as he approached retirement age, to lift higher, hoping to increase his earnings, and therefore, increasing the contribution to the retirement fund and the annuity in the stock he might get at the end of it" (R. 366). When questioned by the court, counsel for the Company concurred that the Plan was an inducement for employees to continue with the Company (R. 388).

It may be recalled that the Company could, while the Plan was in effect, discharge a store manager or any other participant without cause (R. 178). Numerous cases have held that bonus pension provisions established to induce employees to remain with and contribute loyally to the Company constitute a form of compensation to such employees.

Gearns v. Commercial Cable Co. (1942) 177 Misc. 1047, 32 N.Y.S. (2d) 856, 858, aff'd (1943) 266 App. Div. 315, 42 N.Y.S. 2d 81, aff'd. (1944) 293 N.Y. 105, 56 N.E. 2d 67, rehearing denied (1944) 293 N.Y. 755, 56 N.E. 2d 749

Plaintiff had been retired under a pension plan which reserved to employer the right to alter the plan provided such change did not prejudice the rights of

an employee entitled to benefits. Speaking of this provision, the court stated (32 N.Y.S. (2d) at p. 858):

“Even in the absence of such a provision, it is doubtful if defendant arbitrarily could have refused payment as the plan was not merely a benefaction but a contract supported by plaintiff’s consideration of continued services under the plan and his acceptance of other obligations under it. *McLemore v. Western Union Telegraph Co.*, 88 Or. 228, 171 P. 390; *Western Union Telegraph Co. v. Hughes*, 4 Cir., 228 F. 885; *McNevin v. Solvay Process Co.*, 32 App. Div. 610, 53 N.Y.S. 98; *Schofield v. Zion’s Co-op Mercantile Institution*, 85 Utah 281, 39 P. 2d 342, 96 A.L.R. 1083.”

Wilson v. Rudolph Wurlitzer Co. (1934) 48 Ohio App. 450, 194 N.E. 441, 443

Employer announced a plan whereby at employer’s sole expense pensions were to be paid on retirement based upon years of service (minimum 10 years (and wages earned. Plaintiff, who was entitled to a pension, was refused one because he was discharged for failure to comply with request for work at night. On page 443 the court stated:

“It is plain that the pension plan was an integral part of the program for his employment. * * * This provision constituted a continuing part consideration for the services rendered by the employee. It was a daily inducement to continuation of service and to exertion to satisfy, which was successful for more than twenty-four years.

"The fact that the employment was subject to the will of both parties only makes the character of the inducing provisions more binding upon the employer." (Emphasis added)

Tilbert v. Eagle Lock Co. (1933) 116 Conn. 357, 165 Atl. 205, 207

Perkins v. Eagle Lock Co. (1934) 188 Conn. 658, 174 Atl. 77 (Involved same plan as Tilbert case, *supra*)

Robinson v. Standard Oil Co. (La., 1938) 180 So. 237, 239

Moore v. Postal Telegraph-Cable Co. (1943) 202 S.C. 225, 24 S.E. (2d) 361, 364

Schofield v. Zion's Co-op. Mercantile Institution (1934) 85 Utah 281, 39 P. (2d) 342

McLemore v. Western Union Telegraph Co. (1918) 88 Or. 228, 171 Pac. 390

Mabley & Carew Co. v. Borden (1935) 129 Ohio St. 375, 195 N.E. 697

Psutka v. Michigan Alkali Co. (1936) 274 Mich. 318, 264 N.W. 385

H. S. Kerbaugh, Inc., v. Gray (CCA 2, 1914) 212 Fed. 716

George A. Fuller Co. v. Brown (CCA 4, 1926) 15 F. (2d) 672, 675-676

In the plans considered in the foregoing cases, the employer advanced all the funds. In the Penney Plan, the employer advanced only 7.6 per cent of the funds contributed to the Trust during 1940 and 1941. The above

cases demonstrate, however, that even these funds were a form of compensation to participants.

The profit-sharing contribution under Section 6 (b) of the Plan and the 2 per cent of aggregate salaries contributions under Section 6 (a) of the Plan are "treated as though they were in the Fund at the end of the year in which * * * earned." "Company contributions are credited to participants' accounts on this accrual basis" (R. 146). At the end of each year as such contributions are accrued, they become vested compensation earned by participants.

Roberts v. Mays Mills (1922) 184 N.C. 406, 114 S.E. 530, 532

"In *Youngsberg v. Lamberton*, 91 Minn. 100, 97 N. W. 571, the court held that, where one party agreed to render service to the other for a year for a fixed salary, and received as a bonus a percentage of the business of his employer at a specified time, the employee, if discharged, had a right of action accrued up to that time for the profits or bonus earned."

Because contributions to a retirement plan are compensation "presently earned," issuance of a writ of mandamus was affirmed to compel commissioners to make a required annual payment to a retirement fund.

Retirement Board of Allegheny County v. McGovern (1934) 316 Pa. 161, 174 Atl. 400

McBride v. Retirement Board (1938) 330 Pa. 402,
199 Atl. 130

This latter case relies on the McGovern case and also on two New York cases:

Roddy v. Valentine (1935) 268 N.Y. 228, 197 N.E.
260

Graef v. Department of Health (1928) 131 Misc.
258, 227 N.Y.S. 82

Consistent with this substantive state law (that these contributions were the earnings of participants at the end of the year in which accrued) is the manner in which the Company deducted these payments as a business expense under Section 23 (p) (1) of the Internal Revenue Code (all references are to the 1939 Code) and under New York Tax Laws, Section 365, and New York State Tax Commission, Reg. Art. 119-a and 117. Deductions are not permitted under I.R.C., Section 23 (p) (1) unless they are necessary and reasonable business expenses within the meaning of Section 23 (a) (Reg. 118, Section 39.23 (p)-1 (b)), and they are necessary and reasonable only insofar as they constitute reasonable compensation to the employees.

Charles E. Smith & Sons Co. v. C.I.R. (C.A. 6, 1950)
184 F. (2d) 1011; cert. den. (1951) 340 U.S.
953, 95 L. Ed. 687

Mim. 6021, May 29, 1946, 1946-2 CB 43

Thus, under state substantive law and under federal and state tax law, all the funds used by the Trustee to purchase the Penney stock were the earnings of participants at the end of each year in which accrued. Because the provisions of the Plan regarding the shares of Penney stock are illegal and void, the Trustee holds said stock in a resulting trust for the 1940-1941 participants whose contributions and earnings were used for the purchase thereof.

CONCLUSION

Appellants pray that the judgment of the District Court be reversed, and that judgment be entered declaring that the Plan, in so far as it relates to the Penney stock, is invalid under New York law and public policy, and that the Trust as to said shares is void and of no effect.

Appellants pray that the action thereafter be remanded to the District Court to supervise the administration of the resulting trust in said shares of stock for distribution to appellants and other participants, former and present, in proportion as their contributions and earnings were used for the purchase of such stock.

Appellants further pray that on remand the District Court be directed to award appellants compensation for

the reasonable value of the services of their attorneys in the prosecution of this action, and for their costs and disbursements incurred herein (Specification of Error 8).

Respectfully submitted,

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IN THE
United States Court of Appeals
For the Ninth Circuit.

No. 15,125

HARVEY L. WELLS and HARRY J. ALBERTSEN, on
behalf of themselves and others similarly situated,
Appellants,
v.

J. C. PENNEY COMPANY, a corporation, and THE
CHASE MANHATTAN BANK, a corporation (substi-
tuted for The Chase National Bank of the City of New
York),
Appellees.

BRIEF FOR APPELLEES.

**Appeal from Final Judgment of the United States District
Court for the District of Oregon.**

HONORABLE GUS J. SOLOMON, JUDGE.

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FILED

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

HARVEY L. WELLS and HARRY J.
ALBERTSEN, on behalf of themselves
and others similarly situated,
Appellants,
vs.

J. C. PENNEY COMPANY, a corporation,
and THE CHASE MANHATTAN BANK,
a corporation (substituted for The
Chase National Bank of the City of
New York),
Appellees.

No. 15,125

BRIEF FOR APPELLEES.

**Appeal from Final Judgment of the United States
District Court for the District of Oregon.**

HONORABLE GUS J. SOLOMON, JUDGE.

Preliminary Statement.

In this action Appellants attack the validity of the Penney Company Profit-Sharing Retirement Plan for Management Staff (hereinafter usually referred to as the Plan). In 1940 the Penney Company with the approval of its stockholders adopted this Plan for its present and future store managers and central and branch office associates holding positions of responsibility. As Mr. Sams, then President of the Company, explained in his foreword in the booklet

which presented the Plan to eligible associates (Ex. 125), it was the result of years of study to meet the particular needs of the Company. The Plan includes provisions for benefits in the form of cash and annuities for all participants to be provided by Company contributions, participants' contributions, earnings of the Fund and dividends on the Penney Company stock held by the Fund under the Plan. It contains provisions for participants reaching retirement age to receive in addition shares of the Penney Company stock held in the Fund (Exs. 125, 127). As an essential part of the Plan, the Company, at the Plan's inception, sold to the Trustee 200,000 shares of its authorized and unissued stock for \$30 per share when the market value was \$80 per share (R. 116, par. 27) to be held and distributed pursuant to the terms of the Plan.

The Plan has been in continuous operation since 1940. When established, participants numbered 1,716. At the end of 1953 there were 1,955 participants. Between 1940 and December 31, 1953, 943 participants had left the Company before reaching retirement status (R. 231, par. 28) and had received credits totalling \$13,169,736.56, of which \$5,319,173.34 represented credits in excess of their own contributions (R. 239, par. 36). During the same period, 272 participants had left the Company upon reaching retirement status (R. 231, par. 28) and had received, in the form of annuities, credits totalling \$10,981,476.76, of which \$4,623,728.83 represented credits in excess of their own contributions (R. 240, par. 37). In addition to these credits, the Trustee had, by December 31, 1953, distributed to such retiring participants 101,920 shares of Penney Company stock held by it under the Plan, of which 7,163 shares were delivered prior to the three-for-one stock split in 1946 (R. 241, par. 40). The market value per share of such stock as of July 1 in each year is shown in the record (R. 119). Of the original 200,000 shares of Penney Company stock in the Fund, the Trustee on December 31, 1953, held 483,754 shares of such stock, split 3 for 1, with a total market value of \$36,039,673 (R. 241).

The above facts briefly describe the magnitude and many years of operation of the Plan which Appellants seek to destroy.

Appellants assert that as former Penney Company associates they were "forced by their employer to become participants" in the Plan (Br. 2, 3). No issue respecting duress exists of record in this case. Employment by the Penney Company has been and is at will (R. 177, 178). The requirement of participation in the Plan is simply one of the conditions of employment for the management staff. Many benefits resulted from such employment (Hughes R. 349). As shown above, participation in the Plan results in substantial financial benefits to the participants. Personal contributions of participants are made solely from the liberal share of profits which they receive under their compensation contracts with the Company (R. 219, par. 9, R. 225, par. 15). As the trial court found (R. 245), "The Plan is generous and sound."

The liberality of the Plan is also demonstrated specifically by the fact that Appellant Wells, who resigned (Ex. 242) in 1948 at age 52, had total credits of \$22,563.48, of which \$13,929.70 were personal contributions and \$8,633.78 were other credits (R. 171, 172, 246). Appellant Albertsen, who was discharged (R. 109) in 1950 at age 54, had credits of \$52,967.81, of which \$30,213.13 were personal contributions and \$22,754.68 were other credits (R. 173, 174, 247).

Appellants' asserted cause of action depends on one false premise—that the Plan is invalid as a lottery, a wagering contract or tontine insurance policy, and therefore void. If that premise falls, their whole case falls. Their claim of relief also depends on one false premise—that the Penney stock held by the Trustee was purchased with the earnings and compensation of the 1940 and 1941 participants. On this premise they claim that there would be a resulting trust, if the Plan should be declared invalid.

The first premise goes to the merits; the second goes only to the relief. Neither is true.

Appellants center their fantastic charge that the Penney Plan is a lottery, wagering contract or a tontine insurance policy on the operative effects of its provision that only participants who continue in the service of the Company until they reach retirement status will receive shares of Penney Company stock. Participants receive all their other benefits under the Plan upon separation, regardless of when their service terminates, regardless of age at that time, and regardless of whether they quit, are discharged or die.

These other benefits are provided by contributions made by the participants out of the profit-sharing portion of their remuneration, contributions made by the Company, which are measured by its profits, dividends on the shares of stock held by the Trustee, and earnings of the Fund. The Plan thus extends to the area of benefits receivable upon retirement or earlier separation, the Company's long established policy of providing incentives through profit-sharing. The greater the Company's profits, the greater the Fund from which participants' benefits come. The greater the services of the individual participant, store manager or central or branch office associate—the greater his responsibilities, the harder he works, the more his store or the Company prospers—the greater will be his profit-sharing compensation, his personal contributions, his proportionate share of the Company's contributions measured by profits and of dividends, and, as a consequence, the greater will be his Plan benefits.

In addition, if a participant continues in service until retirement at age 60, he receives a number of the shares of the Penney Company stock held by the Trustee in the Fund. The exact number will depend on the ratio of that participant's personal contributions when he retires to the total personal contributions of all other participants at that time. The greater the value of his services over the years in relation to the value of the services of all other participants, as measured by that ratio, the more Penney Company shares (within the limits specified by the Plan) he will receive on retirement.

The false premise of Appellants that the Penney stock held in the Trust was purchased with the earnings and compensation of the 1940 and 1941 participants does not relate to the merits, but only to what the relief should be if they can prevail on the merits. As we show in detail below (Point IV), there is no basis for a resulting trust. The stock was sold by the Company to the Trustee in 1940 at a price which was only about 37½% of its market value at that time (a detail which Appellants overlook). The Trustee, in strict accordance with the Plan, borrowed from a bank the money to pay for the stock. The Trustee then paid off the loan out of funds in the Trust. It is true that the trust funds resulted in part from contributions made by participants, in part from contributions made by the Company, and in part from dividends on the stock so purchased (and it is freely conceded that the entire Plan constituted one of the terms of employment of the participants). But this does not change the fact that it was trust moneys, not participants' moneys, that paid off the loan incurred to purchase the stock. The cost of the stock on the books of the Fund, as shown in Point IV, will be entirely covered by Company payments, and dividends on the stock paid prior to September, 1941.

The purchase of the Penney Company stock was a wonderful investment for the Trust. It has yielded in dividends alone (in which participants have shared, including these Appellants before they left the service of the Company) far more than the original cost of the stock. The stock is an asset of the Trust and held, in accordance with the terms of the Plan, for the benefit of all participants, present and future.

I. THE PROFIT-SHARING RETIREMENT PLAN IS VALID AND LEGAL.

A. There Is No Merit to Appellants' Contention That Stock Is Distributed to Participants in a Manner Contrary to New York Law and Public Policy.

(See Appellants' Specifications of Error Nos. 1, 2, 3, and 5)

Appellants contend that the trial court erred in not finding that the Plan and Trust Agreement provide benefits contingent on the predecease, discharge and withdrawal of participants; they also contend that the trial court did not make any finding to the contrary (Specification of Error No. 1, Br. 15; Br. 20).

To the extent that this contention is directed to any alleged insufficiency in the findings it should be disregarded because the trial court entered detailed findings setting forth the provisions of the Plan, showing how the shares of stock are held by the Trustee, the participants entitled to receive them and the formula for determining the number of shares distributable to retiring participants, and concluded that the stock provisions of the Plan are valid and legal (R. 235, 236, 238 pars. 33 and 34, R. 241 par. 40, R. 242 par. 41, R. 244 par. 45, R. 250 and 251). These findings amply support the trial court's conclusion. See *Carr v. Yokohama Specie Bank, Limited*, 200 F. 2d 251, 254, 255 (9th Cir. 1952).

Appellants refer to the method used in determining the number of shares of stock to be distributed to each retiring participant (Br. 20). They incorrectly state that the amount of stock is determined by the ratio of a participant's credits to the credits of all participants, whereas the ratio used is that of participant's personal contributions to personal contributions of all participants (Ex. 125, Art. 10, pp. 29-30).

Appellants misinterpret the Plan when they attempt to make it appear that an increase in the percentage (i.e.

the percentage resulting from the foregoing ratio) of each remaining participant and therefore an increase in the number of shares to be received upon retirement is certain to result if the contributions of other participants who leave the Company are withdrawn (Br. 20-27). Such a result does not necessarily follow.

The Plan was intended to be and is a continuing Plan. The original Plan participants did not constitute a fixed class but Plan participants constitute an open-end class into which new participants enter to take the place of participants who retire or who leave the employ of the Company before attaining retirement status. New participants also enter the Plan as the operations of the Penney Company expand and the number of stores increases. There is a constant flow of participants into and out of the Plan. As stated earlier, in 1940, when the Plan was established, there were 1,716 participants. At the end of the year 1953, there were 1,955 participants. The number of new participants entering the Plan from 1940 to 1953 was 1,454 as against 1,215 leaving the Company on retirement or earlier separation (R. 231, 232).

Each participant contributes annually to the Plan 20% of his profit-sharing compensation for each year (33 $\frac{1}{3}$ % for 1940 and 1941), which compensation, in turn, depends primarily on his performance (R. 219 par. 9; R. 225 par. 15; Hughes, R. 348-350). Each participant's percentage (as stated above, the ratio of his contributions to the total of all participants' contributions) varies from year to year. The increases or decreases in any participant's percentage are the result of many factors arising from the normal operations of a business having the character and magnitude of J. C. Penney Company (R. 217, par. 6).

Some stores make larger profits than others. In general, the more efficient managers have the more profitable stores and accordingly receive the larger amounts of profit-sharing compensation. Such managers are promoted to larger stores; as a result their profit-sharing compensation, and, therefore, their contributions to the Plan, tend to increase

faster than those of other participants. The profits of an individual store, and, therefore, the profit-sharing compensation of the manager, may increase or decrease from time to time by reason of changes in the economic condition of the community in which the store is located, or may change by reason of enlargement, modernization or relocation of a store (Ex. 155, third page). As new stores are opened, the number of participants increases and, as the managers of these stores commence to make contributions under the Plan out of their profit-sharing compensation, the percentage of each other participant in the Plan is affected. When a store manager dies or leaves the Company's employ, another associate must be transferred to take his place. This may necessitate further moves in other stores. Fluctuations from year to year in the profits of the Company as a whole, and additions, promotions and other changes in assignments in the central and branch offices also result in changes in the profit-sharing compensation received by the respective participants in such offices and corresponding changes in the amount of their contributions to the Plan. The composite effect of all the foregoing factors determines the changes that take place from year to year in the percentage of each participant.

In general, over a period of years each participant's contributions will reflect the extent to which his services, measured either by the profits of the individual store managed by him or by the responsibilities assigned to him in the central and branch offices, are of value to the Company. Whether his percentage will increase or decrease, however, will depend not only on his own performance and his own contributions to the Plan, but also on the contemporaneous performances of approximately 1,900 other participants. Of the total number of participants, some are advancing faster than others; some may be retrograding.

That a participant's percentage does not necessarily increase from year to year by reason of withdrawals, is demonstrated by the following examples of cases where almost identical amounts of personal contributions pro-

duced decreased percentages, resulting in the issuance of fewer shares of stock.

Participant	Date of Retirement	Personal Contributions	Percentage	Shares Received
Wood (Ex. 72)	July 1, 1950	\$34,329	.001343131736	604
Hotchkiss (Ex. 73)	July 1, 1951	\$36,390	.001262215245	568
Hedenquist (Ex. 313)	July 1, 1952	\$36,013	.001162615318	523
Lowry (Ex. 315)	July 1, 1953	\$36,572	.001107257434	498

During this period (1950-1953) many participants withdrew from and many others entered the Plan (R. 167).

From the point of view of the individual participant, there is no way of determining in advance whether his percentage will be larger or smaller from year to year. The composite contribution potential of approximately 1,900 participants is as likely to be improved as it is to be impaired by reason of some participants withdrawing from the Company. That result would not be affected, one way or the other, by the fact that the withdrawing participants had not attained retirement status and so received no stock.

The percentage of a participant does not necessarily increase the longer he remains in the Plan. Sometimes it works the other way. For example when Mr. Binzen, who received identical compensation with Mr. Hughes while they were both participants in the Plan and made identical contributions to the Plan, retired in 1950 with total credits of \$271,603.19, his percentage was larger than was Mr. Hughes' percentage when he retired in 1951 with total credits of \$307,162.05. Mr. Binzen received 2,779 shares, and Mr. Hughes received 2,755 shares (Exs. 72, 73).

Appellants' statement (Br. 20) to the effect that the more participants who left the Company before 60, the greater the stock "awards" to remaining participants is misleading. It is of course true that any stock not issued

to retiring participants is held in the Fund for distribution to participants in the Plan who thereafter reach retirement status, regardless of when such participants enter the Plan. Any attempt to convey the impression that a limited or specific group of participants would benefit is unjustified. The Plan was formulated and presented to stockholders as one under which present and future associates would participate and under which shares of stock would be available, for dividend credits and for distribution to retiring participants, over a long period of years (Ex. 55).

1. The validity of the Plan including the foregoing stock provisions is established by its express approval by the Treasury Department and by many court decisions approving plans containing similar provisions.

On August 23, 1940 the Company transmitted the Profit-Sharing Retirement Plan, together with the Trust Agreement, to the Treasury Department requesting an official ruling that the Plan met the requirements for exemption as an employees' trust under Section 165 of the Internal Revenue Code of 1939 (Ex. 310). In a ruling in which the pertinent provisions of the Plan were reviewed, including the formula and provisions for distribution of the shares of Company stock only to participants reaching retirement status, the Commissioner of Internal Revenue concluded that the Plan qualified under Section 165, stating in part (Ex. 310):

“Based on the foregoing it is the opinion of this office that the Profit-Sharing Retirement Plan of J. C. Penney Company is an employees' trust under Section 165 of the Internal Revenue Code. The income of such trust is exempt from the Federal Income Tax.”

Subsequent to the amendment of Section 165 by the Revenue Act of 1942, the Treasury Department on or about December 21, 1944 issued a ruling that the Plan met the

requirements of Section 165(a) of the Internal Revenue Code as amended and therefore qualified as an employees' trust entitled to exemption from Federal Income Tax. The Treasury Department has also determined that amendments to the Plan submitted to it from time to time did not affect the Plan's continued qualification as an employees' trust entitled to exemption from Federal Income Tax under the applicable provisions of Section 165 of the Internal Revenue Code, and the Plan has so qualified at all times since its adoption (R. 232, 251).

The approval of the Plan by the Treasury Department is highly persuasive of its validity.

The validity of the Plan is further indicated by many rulings and cases expressly approving reallocation of actual forfeitures under employee benefit plans of other companies. Before considering these authorities it should be noted that in the Penney Company Profit-Sharing Retirement Plan there is no forfeiture. No stock is credited to any participant's account at any time (R. 235). All stock is held in the Fund for distribution only to those participants who reach retirement status. A forfeiture presupposes the existence of a right which can be forfeited. Here neither the estate of a deceased participant nor a participant separating before reaching retirement status had any right to receive stock which could be forfeited.

Even if there were some merit in Appellants' contention (R. 180) that "forfeiture" resulted from the failure of participants leaving the Company before attaining retirement status to receive stock, no invalidity would therefore attach to the Plan. In profit-sharing plans (as distinguished from pension plans where benefits must be actuarially determined) reallocation of forfeitures is permitted. The only limitation on reallocation of forfeitures in connection with a profit-sharing plan is that such reallocation shall not be discriminatory in favor of officers, shareholders, supervisors, or highly compensated employees. The Penney Plan involves no such discrimination. (See pages 44 et seq. below.) Rev. Rul. 33, C. B. 1953-1, 267, 280, provides in part as follows:

“(1) *Application of forfeitures.*—Funds under a qualified plan arising from forfeitures because of termination of service, or other reason, must not be allocated to the remaining participants in a manner that will effect the prohibited discrimination. In a pension plan, this requirement is met by complying with the rule regarding definitely determinable benefits, to wit: ‘Benefits are not definitely determinable if funds arising from forfeitures on termination of service, or other reason, may be used to provide increased benefits for the remaining participants instead of being used to reduce the amount of contributions by the employer.’ Similarly, in a stock bonus or profit-sharing plan the contribution formula may provide that forfeitures be used to reduce the employer contributions which would otherwise be required by the formula, but such application of forfeitures is not mandatory in such plans. Nevertheless, it should be observed that whatever provision is made for absorbing forfeitures under a stock bonus or profit-sharing plan the prohibited discrimination must not result.”

In an article “Discrimination Problems in the Drafting and in the Operation of Pension and Profit-Sharing Plans” by Emanuel L. Gordon, New York University Fourteenth Annual Institute on Federal Taxation (1956) page 1153, the author states (p. 1173):

“Under both the old (Reg. 118 par. 39.165-1(a)(2)) and the proposed (Prop. Reg. 1.401-1(b)(1)(ii)) regulations, the employer’s contribution to the plan (if there is one in the year in question) must be allocated to participating employees in accordance with a fixed formula. Even under the old regulations, however, forfeitures might have been used to reduce contributions called for by the formula, although normally they were reallocated among the remaining participants. Clearly, the employer’s option as to handling forfeitures continues under the proposed regulations.”

In an article “Advantages and Disadvantages of Pension, Profit-Sharing and Stock Bonus Plans: a Case Study” by Meyer M. Goldstein, New York University Fourteenth

Annual Institute on Federal Taxation (1956) page 1225, the author states (p. 1233) :

“It may be argued (and correctly) that forfeitures under a profit-sharing plan may be reallocated among the remaining participants thus increasing their distributive portions under the plan. That is so but only if the reallocation does not result in discrimination in favor of employees who are officers, shareholders, supervisors or highly compensated.”

The “Specimen Profit-Sharing Plan and Trust Agreement” prepared by the Committee on Pension and Profit-Sharing Trusts of the Section of Real Property, Probate and Trust Law, American Bar Association, constituting the report of the Committee for 1947, appearing in *Prentice-Hall Pension and Profit-Sharing Service*, page 8163, provides (p. 8185, par. 9.7 referring to p. 8180, par. 6.8) that the amounts of any forfeitures shall be pro rated among the other members’ accounts in the proportion which the amount of each member’s account bears to the total of the amounts in all of the members’ accounts.

In *Prentice-Hall Pension and Profit-Sharing Service*, page 4084, paragraph 4174, page 4084 it is stated:

“*Use of forfeited interests.*— It is not unusual for plans to provide that employees’ interests in the employer’s contributions shall be forfeited at severance of employment, death or for other reasons. * * *

“* * *

“* * * The usual procedure under profit-sharing and stock bonus trusts is to use forfeited amounts to provide additional benefits for the remaining participants. * * *”

Ryan School Retirement Trust, Bank of America National Trust and Savings Association, Trustee, 24 T. C. 127, No. 17, April 29, 1955 (Acq. C. B. 1955-2, p. 9) involved a profit-sharing retirement plan where the amount of benefits an employee failed to receive (due to ceasing participation prior to the period prescribed for full benefits)

was to be reallocated among remaining participants serving the required period. Originally there were 115 participants, 5 of whom were officers. Initial contributions to the trust for the 5 officers amounted to \$5,954.80 and for rank and file employees \$70,676.27. As of October 31, 1951 there were 10 remaining participants, 5 of whom were officers, and the fund had been credited or distributed as follows: \$52,603.80 had been credited to the accounts of the 5 officers; \$19,134.32 had been credited to the accounts of the remaining 5 employees; and \$19,075.36 had been paid out to terminated employees. The Tax Court held that there was no prohibited discrimination in favor of the officers and that the trust was exempt under 165(a) of the Internal Revenue Code, stating in part (No. 17, p. 8):

“The respondent did not argue that the vesting provisions and the method of distributing forfeitures used here were inherently discriminatory. Those provisions, however, are the cause of the alleged discriminatory division of the trust funds. But such provisions as were present here would in any plan inevitably operate to give all permanent employees (including both officers and rank and file employees) a preferred position over that group of employees among which turnovers are frequent. If there is any discrimination here, it would seem to be in favor of the permanent employees as against the impermanent employees, but that is not the type of discrimination contemplated by the statute.”

In *Commissioner of Internal Revenue v. Produce Reporter Co.*, 207 F. 2d 586 (7th Cir. 1953), affirming decision in 18 T. C. 69, the Court held that the two trusts involved were exempt under section 165(a). The Tax Court opinion disclosed that both trusts contained the following provisions:

“6. THAT, in the event any Member resigns from the employ of said Company, said Member's interest automatically accrues to the benefit of all remaining Members, and will be promptly distributed to all such Members in the proportion that their term of con-

tinuous employment bears to the total terms of continuous employment of all other Members” (18 T. C. 69, 71).

In *H. S. D. Co. v. Kavanagh, Collector of Internal Revenue*, 191 F. 2d 831 (6th Cir. 1951) the issue was whether contributions to two trusts for employees set up by the appellant were deductible in computing excess profits tax. The District Court held that the contributions were not deductible because of discrimination in favor of executive employees, two of whom were substantial stockholders of the corporation. The judgment of the District Court was reversed by the Court of Appeals. The District Court’s opinion contains the following reference to the forfeiture provisions in the trusts (88 F. Supp. 64, 69):

“15. The rights of the employees under this plan were forfeitable at the time the taxpayer contributed thereto for the reason that the employees’ trust agreement provided that when an employee voluntarily or involuntarily, left his employment with the company for any reason except cause (which is gross misconduct, dishonesty or insubordination) he would receive 10% of the contributions standing to his account for each year of service up to five years and 5% of such contributions for each year over five years and 100% of such contributions only at or after 10 years and the parties stipulated that the provisions of the Executive Trust Agreement, as amended, as to payment of benefits to beneficiaries and terminations were the same as provided for beneficiaries of the employees’ trust.”

In passing on the propriety of the reallocation of forfeitures to remaining beneficiaries the Court of Appeals stated (p. 843):

“* * * As to the forfeitures, they were forfeitures to the trust itself. The trust agreement provides that no part of the trust funds can go to anyone except the beneficiaries. They received all of the benefits and assets. None of the assets of the trusts was forfeited

to appellant. The forfeitures above mentioned were forfeitures of a portion of the interest of specific beneficiaries which would occur under the terms of the trust, if they left the employ of the company within ten years. Such money would remain in the trust and would accrue to the benefit of the remaining participants. Neither appellant taxpayer or its executives or stockholders would profit thereby. The termination and forfeiture provisions of both trusts were identical; and, with respect to such provisions, all employees in both trusts have been treated identically. Neither the taxpayer nor the Trustee could control the operation of the termination and forfeiture provisions; and forfeitures occurred in both trusts."

The case of *Schaefer v. Bowers*, 50 F. 2d 689 (2d Cir. 1931) involved a five year contributory stock subscription plan of the Standard Oil Company of New Jersey. Judge Learned Hand held that the plan was an exempt employees' trust under Section 219(f) of the Revenue Act of 1926, which was a predecessor of Section 165 of the Internal Revenue Code of 1939. The plan provided that if an employee's services were terminated voluntarily or if he was discharged for cause he was to receive only his own contributions back with interest, or at the option of the trustees an equivalent in shares, and the court stated (p. 690):

"Any shares or money accruing through withdrawals swelled the fund as a whole, and at its 'termination the fund shall forthwith be liquidated by the distribution of all the stock and cash therein to and amongst the then participants' * * *"

Even in situations where a trust for employees has not been qualified under Section 165 of the Internal Revenue Code the employer has been permitted to take a deduction for contributions to the trust without any criticism by the courts with respect to provisions of the trust for reallocation of forfeitures to remaining participants. See *Commissioner of Internal Revenue v. Surface Combustion Cor-*

poration, 181 F. 2d 444, 445 (6th Cir. 1950); *Gus Blass Co.*, 9 T. C. 15, 45 (1947); *Harold G. Perkins*, 8 T. C. 1051, 1053 (1947); *Julian Robertson*, 6 T. C. 1060, 1063 (1946); and *Gisholt Machine Co.*, 4 T. C. 699, 702 (1945).

In the *Gus Blass Co.* case referred to above the Tax Court stated with respect to reallocation of forfeitures as follows (p. 45):

“* * * The agreement not only states that the fund is for the sole and exclusive benefit of the employees, without any right of reverter in the petitioner, but also, with respect to employees who might forfeit their rights therein by leaving the employment, it provides that the shares allotted to them shall be distributed among the remaining employees.”

In the case of *Harold G. Perkins*, *supra*, the Tax Court summarized provisions relative to reallocation of forfeitures as follows (p. 1053):

“A trust indenture in accordance with the resolution was executed on September 30, 1941. It provided that if any beneficiary, within five years from the date of the creation of the trust for his benefit, should voluntarily leave the employ of Nash, except on account of illness or incapacitating disability, or if within that period his employment by Nash should cease through fault of his own as determined by the advisory committee, then the amount of benefits which he should be entitled to receive from the payments by Nash should equal one-half of that property held for his benefit in the trust. Any portion not paid to him was to be held for the benefit of the other trust beneficiaries. The trust beneficiaries had the right to designate death beneficiaries under any contracts of insurance held for their benefit.”

2. The New York State Legislature has authorized numerous public pension or retirement plans providing benefits contingent upon service during a specified time or until a specified age.

An example of the type of legislation last above referred to is the State Teachers Retirement System for Public

School Teachers, 16 McKinney's Consolidated Laws of New York, Education Law, Part 1, (Sections 510, 511, 512, 516, 517) which is a contributory plan providing benefits after service for a specified period or to a given age. If an employee withdraws or dies before satisfying the service or age requirements he or, in case of death, his estate, receives no benefits under the plan, but receives only the amount of the employee's contributions.

For other illustrations of plans authorized by the legislature where benefits are contingent on service as above indicated, see: Retirement Of Officers And Employees By The Justices Of The Appellate Division, First Department (29 McKinney's Laws, Judiciary Law, Section 108); Retirement Of Officers And Employees By The Judges Of The County Court of Kings County (29 McKinney's Laws, Judiciary Law, Section 207); Retirement Of Officers And Employees By The Judges Of The Court Of General Sessions Of The County Of New York (29 McKinney's Laws, Judiciary Law, Section 208); Retirement Of Officers And Employees In the State Civil Service (9 McKinney's Laws, Civil Service Law, Art. 4, Sections 58, 61).

The case of *Matter of Bristol*, 93 Misc. 626, 158 N. Y. S. 503 (1916), affirmed 173 App. Div. 545, 160 N. Y. S. 410 (1916), involved the Yonkers Public School Teachers' Retirement Fund held by trustees. The fund was made up of the following: donations, legacies and gifts; 1% per annum of teachers' salaries; 5% annually of excise moneys received by the City; and:

“*Fourth.* All forfeitures or deductions of or from the salaries of those in the service who are members of the association.” (p. 629)

In passing on the rights of the participants in the fund in the possession of the trustees, the Court held that the members acquired no vested right in the funds and that until reaching retirement status their interest in the fund was a mere expectancy.

These plans for public employees show that the public policy of the State of New York sanctions provisions in pension or retirement plans which provide for forfeitures swelling the pension or retirement fund.

Similarly, under the act providing for Retirement of Civil Service Employees (5 U. S. C. A. Sec. 691 *et seq.*) compulsory deductions of a certain per cent of employees' salaries are made and paid over to the Civil Service Fund, and the fund including earnings thereon is used to provide annuities on retirement or specified disability. In the event of the death of a participant before the prescribed minimum service period, he forfeits all interest in the fund except the right to receive back the deductions from his salary with interest thereon.

3. (a) The Penney Profit-Sharing Retirement Plan does not involve life insurance and bears no resemblance to a tontine life insurance policy.

There is no basis for Appellants' argument that the Plan is subject to the New York Insurance Law, Section 146, relating to insurable interest, or Section 200, Subdivision 5, relating to retirement systems (Specification of Error No. 3, Br. 16; Br. 33). Here we are dealing with a profit-sharing retirement plan—not a life insurance policy. No participant obtains any insurance on the life of another participant. The Plan is not in any sense a contract of insurance, was not organized under the Insurance Law, and is not subject to that law. The inapplicability of the Insurance Law is shown by the case of *Colaizzi v. Pennsylvania Railroad*, 208 N. Y. 275, 101 N. E. 859 (1913) where the Pennsylvania Railroad was held not to be engaged in the business of insurance even though it maintained a contributory relief fund for employees under which benefits were payable upon disability or death.

There is nothing in the law which requires that the Plan be qualified under Section 200. Qualification under the provisions of this Section is *not in any sense mandatory*.

The group annuity contracts held by the Trustee under the Plan (Ex. 309) are of course subject to the approval of the Superintendent of Insurance in accordance with Section 154 of the New York Insurance Law.

Furthermore, even if Section 200 of the New York Insurance Law were in any way applicable to the Plan, no change would have had to be made in any of its features which are challenged in this action because, as stated above, the Plan is not an insurance contract, and the insurable interest requirement of Section 146 is not relevant.

Appellants attempt to impute invalidity to the Plan on the ground that it involves a tontine contract (Br. 32).

Tontine insurance is defined in *Richards on Insurance Law* (3rd Ed. 1915), Sec. 21, page 24, as follows:

“A tontine policy is one in which it is agreed that certain accumulations or profits of the business shall be apportioned among those of the insured of a certain class surviving, at certain intervals; for example, every ten, fifteen, or twenty years. The lapsed policies of the class forfeit their reserve and dividends to the survivors. A tontine dividend is the distribution of such profits among the survivors who are entitled to it after the given period. A semi-tontine policy is one in which it is agreed that the dividends only shall be apportioned among the survivors of the class.”

In the Penney Plan there is no fixed class, there is no specified period of time, there is no forfeiture, there is no accumulation of profits, insurance is not present, the purpose of the Plan is to compensate for services rendered and all Plan benefits are based upon services performed. It is apparent that the Penney Company Profit-Sharing Retirement Plan has no similarity to tontine insurance.

(b) Tontine life insurance policies have never been declared wagering contracts in New York.

Contrary to Appellants' assertion (Specification of Error No. 3, Br. 16; Br. 33, 34), no decision in the State of New York has been found which holds that a tontine

insurance policy constitutes a wager or gambling contract. In fact, rights and obligations under contracts of insurance issued prior to 1907 containing provisions for tontine accumulations were regularly enforced in the courts of the State of New York. *Simmons v. New York Life Insurance Company*, 38 Hun. 309 (N. Y. Sup. Ct. 1885); *Bogardus v. New York Life Insurance Co.*, 101 N. Y. 328, 4 N. E. 522 (1886); *Uhlman v. New York Life Insurance Co.*, 109 N. Y. 421, 17 N. E. 363 (1888); *Columbia Bank v. The Equitable Life Assurance Society of the United States*, 79 App. Div. 601, 80 N. Y. S. 428 (1st Dept. 1903); *McDonnell v. Mutual Life Insurance Co.*, 131 App. Div. 643, 116 N. Y. S. 35 (1st Dept. 1909); *Langdon v. Northwestern Mutual Life Insurance Co.*, 199 N. Y. 188, 92 N. E. 440 (1910); *Danner v. Equitable Life Assurance Society of the United States*, 156 App. Div. 562, 141 N. Y. S. 442 (1st Dept. 1913); *Gadd v. Equitable Life Assurance Society*, 97 Fed. 834 (S. D. N. Y. 1899).

When the foregoing cases were decided gambling and lotteries were illegal in New York. The revised statutes of that State which went into effect in 1830 made all betting and gambling illegal. The New York State Constitution of 1846, Article I, Section 10, prohibited lotteries, and the revised Constitution adopted in 1894, effective January 1, 1895, provided in part as follows (Article I, Section 9):

“* * * nor shall any lottery or the sale of lottery tickets, pool selling, bookmaking or any other kind of gambling hereafter be authorized or allowed within this State; and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this Section.”

For the history of these provisions, see *People ex rel Collins v. McLaughlin*, 128 App. Div. 599, 602, 603; 113 N. Y. S. 188, 190, 191 (1st Dept. 1908).

Furthermore, in view of the above decisions it is evident that tontine insurance was sanctioned by the New York Courts despite the existence of the common law rule recognized in *Ruse v. Mutual Ben. Life Ins. Co.* (1861), relied on

in Appellants' brief (32), requiring insurable interest as a condition to the validity of life insurance policies.

It is apparent that the New York Courts did not consider insurance contracts which contained provisions for tontine accumulations illegal as involving a lottery, wagering or gambling contract within the meaning of the foregoing constitutional and statutory provisions.

In 1906 the Legislature among other changes in the New York Insurance Law added a provision requiring annual apportionment of surplus. This had the effect of prohibiting issuance thereafter of insurance contracts containing provisions for accumulations of surplus in excess of one year. This amendment, applicable not *ab initio* but only to policies issued after January 1, 1907, was not adopted on the basis that such type of accumulation was considered as a wager but rather to prevent the building up of huge surpluses over long periods of time with respect to which there had been prevalent wasteful abuses by the insurance companies and lack of control over such abuses by the insured. This legislation, of course, has no application or relation to the Penney Plan. The background of this legislation is described in *Richards on Insurance Law*, (3rd Ed. 1915) pages 17, 18 as follows:

"In the United States, life insurance has attained a greater relative importance among financial institutions than in any other country. During the years which immediately followed the close of the Civil War, it grew with unparalleled rapidity; new companies were established in great numbers; new features of insurance contracts were devised, and soliciting agents canvassed the country from one end to the other. It is to be observed that fire policies on the average are for a much shorter term than life policies, and that a life company is ordinarily obliged to accumulate for the payment of future losses a much larger amount of assets than is required in the conduct of the business of marine or fire insurance, since, unlike the perils of shipwreck and fire, the peril of death is sure to occur sooner or later to the persons whose life is insured. Moreover, popular modern forms of life insurance

policies have involved the payment of deferred dividends of indefinite amount at stated periods in the distant future to fortunate survivors of a class.² The result followed that large life companies in this country,³ in a wild race for supremacy among themselves, amassed enormous amounts of assets and surpluses which were not set aside for proposed betterments, or appropriated for present dividends, like the assets of a railroad or industrial corporation, or kept subject to call like the assets of a savings bank, but were retained for purposes which only the company's actuaries could fathom, a colossal trust fund which carried with it, especially to the officers and finance committees, temptations of an exceptional and subtle character. The machinery of the insurance departments proved ineffective to protect the policy holders from evil consequences of startling proportions, and after a notable investigation by a committee of the New York legislature, statutes of a drastic character were recently adopted in that state.¹"

Footnotes—page 17: "(2) Tontine and similar forms, see Sec. 21.

"(3) Conspicuously the three great New York Companies, the Mutual, the Equitable, and the New York Life."

Footnote—page 18: "(1) N. Y. Law, 1906, c. 326. The Armstrong committee, the Hon. Chas. E. Hughes, counsel. The following results among others were accomplished by these laws affecting life insurance companies. 1. Policyholders given a more effective voice in the government of the companies. 2. Full publicity secured to policyholders in regard to management of companies' affairs. 3. Policies limited to four standard forms. 4. Policies safeguarded against forfeiture, warranties being converted into representations in absence of fraud. 5. Deferred dividend policies prohibited. 6. Companies obliged to make equitable distribution of surplus to policyholders at stated periods. 7. Investments regulated and control of subsidiary companies prohibited.—The New York court had decided substantially that upon maturity of his policy in a mutual company the policyholder could get for his share of the surplus only what the directors saw fit to divide. *Greeff v. Society*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. R. 659."

Appellants (Br. 34) rely upon the case of *Walker v. Walbridge*, 151 Misc. 329, 271 N. Y. S. 473 (1934) as authority for the proposition that the New York Courts have declared a tontine type of insurance policy null and void as a wagering contract. That case did not pass on the validity of a tontine accumulation, and in fact the court did not even mention the word "tontine". The *Walker* case involved an action on a note given by the defendant to C. W. Colgrove System, Inc. and assigned by C. W. Colgrove System to the plaintiff for collection. The note was given as a partial consideration for a contract between defendant and C. W. Colgrove System, Inc. whereby defendant agreed, in consideration of a like agreement by not more than 99 other subscribers, to take out a life insurance policy naming the Union Bank of Chicago as the beneficiary trustee for the first five years of the insurance policy. The agreement provided that in the event the insurance matured as a death claim within five years of its date of issue the trustee would administer the proceeds thereof by paying therefrom in full any indebtedness on said note to C. W. Colgrove System, Inc. and then paying 25% of the face amount of the insurance for the benefit of surviving subscribers to the C. W. Colgrove System, Inc. contract. The interest of each surviving subscriber was to be computed and based on the proportion that his first year's premium on the insurance bore to the total aggregate first year's premium of all surviving subscribers. The balance of the face amount of the policy was payable to the beneficiaries designated by the insured.

There was no purpose in entering into the Colgrove scheme other than to gamble 25% of the face amount of the life insurance policy against the hope of gain that would result from the prior death of other subscribers to the scheme. Participants do not enter the Penney Plan for any comparable purpose.

The court in the *Walker* case referred to the well settled principle of law that if a beneficiary, not selected by the insured, named in a policy of insurance has no insurable

interest in the life of the person insured then the transaction is a wager and void. The court then determined that the subscribers to the Colgrove System, Inc. contract had no insurable interest in each other and concluded (p. 337):

“* * * this court comes to the conclusion that the other ninety-nine persons of the one hundred persons referred to in the contract and made the beneficiaries of the policy have no insurable interest in the life of the defendant herein and he has no insurable interest in their lives and, therefore, the transaction which included such policy and contract is void as being part of a wagering contract and against public policy.”

The *Walker* case merely involved an attempt to make proceeds of a life insurance policy distributable in part to persons having no insurable interest in the insured, a problem not involved in determining the validity of the Penney Company Profit-Sharing Retirement Plan.

The cases of *Colgrove v. Lowe* and *Knott v. State* (Appellants' Br. 37-39) arising in Illinois and Florida both involved schemes similar to that in the *Walker* case.

Fuller v. Metropolitan Life Ins. Co. and *U. S. Life Ins. Co. v. Spinks* relied on by Appellants (Br. 41-43) are likewise not in point.

As shown by the digest in Appellants' brief, the Connecticut Supreme Court of Errors in the *Fuller* case reversed the lower court on the ground that error had been committed in admitting in evidence certain (expert) testimony. The court stated in that case by way of dictum that if plaintiffs' theory were accepted a wagering contract would be involved requiring dismissal of their complaint because a court of equity would not apportion the spoils of gamblers.

The *Spinks* case decided by the Kentucky Court, did not pass on the validity of tontine insurance under New York law. The principal issue was the proper interpretation of a provision in a New York statute relating to "dividend additions". The Kentucky Court incorrectly interpreted

this provision to mean a portion of the undivided surplus in the hands of the company. This incorrect interpretation was pointed out in a later New York case, *Fenster v. New York Life Insurance Company*, 188 Misc. 909, 910, 911; 66 N. Y. S. 2d 871 (1946) where the court stated that the term "dividend additions" refers to paid up additional insurance previously purchased with dividends and expressly rejected the *Spinks* case as having "no persuasive force".

The Penney Company Profit-Sharing Retirement Plan, conceived and operated as a plan to furnish retirement benefits for the management associates of the Penney Company, is not tontine insurance or an insurance contract lacking the requisite element of insurable interest, and is far removed from the type of contract contained in the *Colgrove* case, where the court stated (Appellants' Br. 28) that "the use of such a contract to promote the sale of life insurance presents an appeal to the gambling instincts of prospective policy holders that is contrary to sound principles of public policy."

4. The Plan does not violate New York constitutional and statutory provisions against wagering contracts and lotteries.

The parties are in accord that the law of New York is controlling as to the validity of the Plan and Trust Agreement (R. 178, 399, 400; Appellants' Br. 16).

Appellants contend that the Plan involves a wagering contract and lottery (Specifications of Error No. 3, Br. 16; Br. 46-53). It is difficult to understand the exact basis of their argument. From the record and their brief the alleged basis of their argument seems to be (1) the requirement of service to retirement status as a condition to receiving stock, and (2) that stock is not distributed to participants separating before reaching retirement status but remains in the Fund for distribution to participants who reach retirement status. Neither of these contentions provides any proper basis for their argument that the Plan

involves a wagering contract or lottery under New York law.

The New York Constitution, Article 1, Sec. 9, provides as follows (2 McKinney's Laws, Constitution, part 1):

"No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section. As amended and approved Nov. 7, 1939, eff. Jan. 1, 1940."

The following sections of the New York Penal Law were not fully set forth in Appellants' brief (47):

"Sec. 991. *Illegal wagers, bets and stakes.* All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful."

"Sec. 992. *Contracts on account of money or property wagered, bet or staked are void.* All contracts for or on account of any money or property, or thing in action wagered, bet or staked, as provided in the preceding section, shall be void."

"Sec. 1386. *Contracts, agreements and securities on account of raffling, void.* All contracts, agreements and securities given, made or executed, for or on account of any raffle, or distribution of money, goods or things in action, for the payment of any money, or other valuable thing, in consideration of a chance in such raffle or distribution, or for the delivery of any money, goods or things in action, so raffled for, or agreed to be distributed as aforesaid, shall be utterly void."

Sections 1370 and 1371 are fully set forth in Appellants' brief (48), except for the heading of each section, but are here set forth for convenient reference:

"Sec. 1370. *Lottery defined.* A 'lottery' is a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise or by some other name."

"Sec. 1371. *Lottery unlawful and a public nuisance.* A lottery is unlawful and a public nuisance."

Under New York Law an act or omission is not a crime unless some statute of the State makes it so. *People ex rel. Blumke v. Foster*, 300 N. Y. 431, 433, 91 N. E. 2d 875 (1950); N. Y. Penal Law, Sec. 22 (39 McKinney's Laws).

Penal statutes of the character above quoted are to be construed strictly. In the case of *Federal Communications Commission v. American Broadcasting Company*, 347 U. S. 284, 74 S. Ct. 593, 98 L. Ed. 699 (1954), where it was held that "give-away programs" did not violate Section 1304 of the United States Criminal Code which prohibits the broadcasting of "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance," the Supreme Court stated in part (pp. 294, 296):

"We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime. * * *

"It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give Sec. 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly."

See also *Metropolitan Life Insurance Co. v. Durkin*, 301 N. Y. 376, 93 N. E. 2d 897 (1950) where the court stated (p. 381):

“* * * Such statutes, directed against known and stated evils, are not to be stretched to cover situations having no real or reasonable relation to those evils (see McKinney’s Cons. Laws of N. Y., Book 1, Statutes 1942 ed., Secs. 95, 141, 146, and cases cited; also *Kauffman & Sons Saddlery Co. v. Miller*, 298 N. Y. 38, 44, 45, and *Matter of Breen v. New York Fire Dept. Pension Fund*, 299 N. Y. 8, 19). * * *”

(a) None of the evils intended to be suppressed by the constitutional provisions and statutes prohibiting lotteries and gambling or wagering is present in the Plan.

That the New York Penal Law which forms the alleged basis of Appellants’ action herein has no application to the Penney Company Profit-Sharing Retirement Plan is obvious from an examination of the evils against which lottery or wagering statutes are directed as explicitly set forth by the courts.

In *Irving v. Britton*, 8 Misc. 201, 28 N. Y. S. 529 (Com. Pleas 1894), the court stated (p. 202):

“By incorporating the interdict of lotteries in the Constitution and associating it with the fundamental guarantees of life, liberty and property, the people of New York signalize, by the most emphatic manifestation, their sense of the enormity of the evil they so seek to suppress. That evil consists in the temptation and facilities afforded by the lottery for the indulgence of the passion of gambling, and indulgence, by all experience, as inimical to the well-being of the state as of the individual. * * *”

In *People v. Mail and Express Co.*, 179 N. Y. S. 640 (Court of Special Sessions, 1919), affirmed without opinion in 192 App. Div. 903, 182 N. Y. S. 943, and 231 N. Y. 586, 132 N. E. 898, the court, in condemning a scheme for delivering prizes to holders of cards having the winning identi-

cation markings, referred to the purpose of the lottery law, as follows (p. 642):

“* * * Furthermore, it is argued that the precise mischief that the Legislature sought to correct is present in the transaction shown in this information; that not for any purpose of benevolence, but for gain derived from classes of persons easily subject to temptation and who can ill afford such use of scanty means of subsistence, the defendants developed and nurtured in those who yielded the perverted moral nature of the gamester, fascinated by hope and expectation of fortune's favor, which may give him without service or effort on his part the benefit of others' toil, thus engendering or increasing deteriorating and destructive emotional qualities, selfish greed, false standards of conduct, diseased sensationalism, and resultant slothfulness and dishonesty, and impeding the cultivation of wholesome character, the spirit of service and honor which makes the good citizen; that it would be unworthy of enlightened jurisprudence to allow the evident legislative intent of guarding the public welfare from the influence of this nefarious evil to be defeated by an ingenious device to evade the law by a mere variance of form of procedure, which leaves unchanged all the injurious effects.”

The New York Court of Appeals in *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343 (1888), stated (p. 404):

“The right to legislate upon the subject of intoxicating liquors is acknowledged by every one, and is founded upon the fact that their use in excessive quantities leads, in large masses of cases, to crime, poverty and enormous suffering, and bears most harmfully upon the sum of the happiness of the human race. So in regard to lotteries in general. A wide spread custom of indulgence in the purchase of tickets leads, among the poorer classes certainly, and also among others, to habits of recklessness, waste and idleness; it cultivates a gambling spirit and tends to a hatred of honest labor, and to a desire to obtain riches or money without the necessary expenditure of industrious energy. * * *”

The evils inherent in a typical lottery have been set forth by the Supreme Court of the United States in *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079 (1879), where the court stated (p. 818):

“* * * this court said, more than thirty years ago, speaking through Mr. Justice Grier, in *Phalen v. Virginia* (8 How. 163, 168), that ‘experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple.’ * * *”

In an article entitled “*Insurable Interest In Life*” by Professor Edwin W. Patterson, 18 Col. L. Rev. 381 (1918), the author summarized the evil involved in wagering contracts as follows (p. 386):

“* * * the chief objection [to a wagering contract] is that it leads to an unearned gain—‘unearned’ in the sense that wagering is not socially productive. It is difficult to define the objection, and it has seldom undergone judicial analysis. The harmful social consequences are numerous. Vaguely, a sense of antagonism is aroused in a community of workers against persons who obtain a means of livelihood without participating in the machinery of social or economic production and distribution—in short, against ‘social slackers’. More specifically, unearned gains lead to idleness, and the wagerer becomes a social parasite. Useful business and industry are thereby discouraged. On the moral side, idleness leads to vice; and the impoverishment of the loser entails misery, and, in consequence, crime.”

The trial court properly found that none of the evils enumerated in the foregoing authorities are found in the Plan, and that it does not: (1) encourage any passion for gambling, (2) take money from people who can ill afford to lose it, (3) encourage hope of gain without service or effort, (4) induce habits of waste and idleness and a hatred

of honest labor, (5) promote deterioration of moral qualities, or (6) discourage useful business and industry (R. 245). In short, the Plan, from the point of view of its business, economic and social consequences, is the very antithesis of the schemes sought to be eliminated by the lottery or gambling laws.

(b) The Plan does not have the essential elements of a wagering contract or lottery.

Appellants attempt to bring the stock provisions of the Plan within the prohibitions against wagering contracts on the theory that a lottery is involved (R. 88, lines 7-9; R. 189, par. 5; R. 204, par. 6; Appellants' Br. 48-53; Specifications of Error No. 3, Br. 16).

Under the tests established by the courts for determining what is a lottery, it is clear that neither the Profit-Sharing Retirement Plan of the Penney Company as a whole nor the provisions of the Plan relating to distribution of stock can be considered as constituting a lottery.

It is generally stated that the three essential elements which go to make up a lottery are (1) the distribution of prizes, (2) according to chance, (3) for a consideration. See *Federal Communications Commission v. American Broadcasting Company, supra*.

After an analysis of various decisions considering the essential elements of a lottery under New York law, the court in *Irving v. Britton, supra*, concluded as follows (p. 203):

“From all the cases there are collected as the constituent elements of a lottery, namely: *First*, an expedient held out to the public, which, *secondly*, for a pecuniary consideration, offers the possibility and promise of a gain, not the product of the outlay, but contingent merely upon a designated chance event. As the name imports, the lot or chance is the essential property of the unlawful enterprise, and the allurements to the public the incident that aggravates its mischievous quality. * * *

The New York courts have established that to constitute a lottery, chance must be the dominating and controlling element determining the result. In *People ex rel Lawrence v. Fallon*, 152 N. Y. 12, 46 N. E. 296 (1897) the court stated (p. 17):

“* * * There is certainly a great difference between a contest as to the speed of animals for prizes or premiums contributed by others and a *mere lottery, where the controlling, and practically the only element, is that of mere chance alone*. A race or other contest is by no means a lottery simply because its result is uncertain, or because it may be affected by things unforeseen and accidental. * * * ” (Italics ours)

Similarly, in *People ex rel Ellison v. Lavin*, 179 N. Y. 164, 71 N. E. 753 (1904) the court stated (pp. 170, 171):

“* * * The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the *dominating element that determines the result of the game*.” (Italics ours)

In the more recent case of *People v. Hines*, 284 N. Y. 93, 29 N. E. 2d 483 (1940) a lottery is defined as being (p. 101):

“* * * a scheme for the distribution of property in which a valuable consideration is paid on *chance alone, with no admixture of skill* * * *.” (Italics ours)

It is significant that the basic decisions in New York stating the elements of a lottery arose in cases involving pool selling and book making (Irving), horse racing (Fallon), the numbers racket (Hines) and a guessing program for cash prizes (Lavin) which are far afield from matters of business administration such as profit-sharing retirement plans for employees.

The “suit club” and other merchandise and credit schemes involved in the cases cited by Appellants (Br. 50-53) bear no resemblance to a profit-sharing retirement plan, and furthermore, the inducement to enter into such schemes was the possibility of winning as a prize free merchandise

or cash based solely upon chance. Since this element of chance was the dominating factor, these schemes were held invalid.

Similarly, *State ex rel Home Planners Depository v. Hughes* (Appellants' Br. 50) involved a loan scheme where the opportunity to receive the loan was dependent on the day, hour and minute each application for a loan certificate was received in relation to all other applications for certificates. The court held this was a lottery because the opportunity to receive the loan was based entirely on such chance.

The Penney Plan was and is a profit-sharing retirement plan for the management staff of the Penney Company. The dominating and controlling factors determinative of benefits to participants under the Plan are their services to the Company and the success of the Company. Participation in the Plan is limited to eligible members of the management staff and forms an integral part of their employment relationship with the Company. The amount of each participant's contribution is determined by the amount of his profit-sharing compensation, each participant being required to contribute a uniform percentage of such compensation. Each participant's benefits upon retirement or other separation under the Plan are determined by the ratio of his personal contributions to the personal contributions of all other participants then in the Plan, and are, therefore, directly related to services rendered by each during the period of his participation.

Appellants place major emphasis upon the Plan requirement of continued employment to retirement age in order to receive stock (R. 189, pars. 5 and 6; Appellants' Br. 53). The uncertainty involved in this requirement is one which is inherent in connection with all employment relationships, namely, possibility of death or termination of employment for other reasons. This uncertainty is purely incidental and has no relation to the basic purpose of the Plan. That purpose is to provide on a profit-sharing incentive basis retirement benefits for members of the Company's manage-

ment staff who attain age 60 in the Company's employ and to provide generous additions to the savings of all other participants who do not attain such retirement status (R. 242, par. 42).

The Plan is characterized by certainties and not by uncertainties. Each participant knows that upon leaving the Company at any time, he will receive all credits to his account which include his own contributions, his share of Company contributions measured by profits and his share of dividends and earnings. He has the certainty that if he stays on to retirement status he will in addition receive shares of stock held by the Trustee for distribution to retiring participants. Termination of employment before age 60 because of death or disability results from uncertainties incidental to all aspects of life; leaving voluntarily or on discharge for cause involves an individual's own responsibility.

Appellants emphasize the Company's power of discharge (Appellants' Br. 27). In *Gardner-Denver Co. v. Commissioner of Internal Revenue*, 75 F. 2d 38 (7th Cir., 1935), the court made the following statement (p. 40):

“* * * It is true that the employee might, if he chose, before the stock was paid for in the manner specified, have terminated the agreement and received back the money he had paid, with interest; and the employer might also, under the strict terms of the agreement, by discharging the employee have terminated the contract and relieved itself from further obligation thereunder.

“But we do not believe that under the issues here there should be taken into consideration the possible contingency of the employer doing so harsh and inequitable a thing as to discharge the employee for the purpose only of preventing his completion of the specified payments and avoiding the obligation to convey to him the stock when paid for as specified. * * *”

The record in the present case contains no evidence whatsoever of any abuse by the Company of its power of discharge.

The "chance" of lotteries is not here present in the Plan. Participation in the Plan was mandatory. The advantages offered by employment with the Company (Hughes, R. 348, 349), together with the assured advantages from participation in the Plan, were so great, apart from the opportunity to receive stock under the Plan upon retirement, as to constitute the primary reasons for continuing in the employ of the Company. These circumstances are directly contrary to those in connection with a lottery or wagering scheme where ordinarily the very chance involved is the controlling and dominating factor that induces voluntary participation.

The uncertainty in connection with continuing in the Company's employment to age 60 is an incidental element of every day business life. The Company has retained competent management staff associates and of course has advanced them. Otherwise it could not have succeeded as it has. The possibilities that lead to termination of employment are not the kind of chance generally required to constitute a lottery or wager. The requirement that the "chance" involved be determined, not by factors such as those referred to above but by artificial forces, e.g., the draw of a ticket, the turn of a wheel, the throw of dice, is graphically illustrated in many cases, including the case of *United States v. McDonald*, 59 Fed. 563 (N. D. Illinois 1893), affirmed 63 Fed. 426 (7th Cir. 1894). Therein the court, in instructing the jury, stated (pp. 565, 566):

"Now, every enterprise in which we engage has a return or prize, or is supposed to have. That is the incentive which makes men industrious and active. Whether that return or prize be determinable by mere lot or chance makes it either a legitimate enterprise, or a lottery, and therefore an unlawful enterprise. We perhaps can illustrate that best by referring to some of the schemes of life in which men are engaged. Take, for instance, the life insurance companies,—those that proceed either on the stock plan or on the assessment plan. They require of the member that he pay in a certain amount of money. That is the pecuniary con-

sideration. That money is invested, or supposed to be invested, in securities, and, when the member dies, a certain amount, stipulated in the policy, is paid to his heirs or the beneficiary named in the policy. That is the return. The man may have been insured but a month, and have paid in but a few dollars, and have received back \$5,000 or \$10,000. In such instances as that, a much larger sum has been returned than the consideration, but the fact that there was such a return does not make it an unlawful enterprise. Why? Because the prize is not determinable by, or dependent upon, chance or lot. It is dependent upon the life of a man, and the life of a man is determined by the laws of nature, and not by the chances of lot.

“A man who makes an investment in real estate may put in a few thousand dollars, and take out a million. What he puts in is the consideration; what he takes out is the prize. It may be a hundredfold larger than what he puts in, but on what is it dependent? Upon the growth of the town in which he lives; upon the growth of public sentiment respecting the value of property in that particular locality; upon the law of growth, which is itself a natural one,—an industrial law. But suppose a man puts a ticket in a hat with a hundred other tickets, and then it is drawn by a blindfolded man, his chance of the prize offered is dependent upon that drawing. The ticket may cost but 50 cents. The prize may be worth \$10,—much larger than the price of the ticket, though not larger in proportion than the life insurance policy or the real estate investment. But the getting of the prize is dependent upon the chance or lot of his ticket being drawn, not upon any natural law, as a man’s life, nor upon any industrial growth, as the growth of the value of real estate. This illustrates to you the difference between legitimate investments, which may yield, according to the good fortune of the investor, a hundredfold more than the amount invested, and a gambling investment, according to a lottery, which can only yield in case the allotment or chance, which is purely artificial, turns in his favor.”

In *Eastman v. Armstrong-Byrd Music Co.*, 212 Fed. 662 (8th Cir. 1914) the court emphasized the type of chance

that must be found to characterize a transaction as a lottery, stating (pp. 666, 667):

“While it is true that, if the scheme be a lottery, gift enterprise, or similar scheme, it is not necessary that it shall be determined wholly by chance, but if it rests upon a determination in whole or in part by chance it is sufficient, yet it must be first a lottery, gift enterprise, or similar scheme, and even then the word ‘chance’ is not used in its broadest signification. * * *

“* * *

“It thus appears that it is not every conceivable chance which makes a transaction illegal, and that the word ‘chance,’ as used in the statute, must be construed in connection with the word ‘lot’ and with the words ‘lottery, gift enterprise, or similar scheme.’ The maxim ‘noscitur a sociis’ applies, and the meaning of the word ‘chance’ is to be known or explained by its associates.
* * *”

The necessity that artificial forces be the determining factor in relation to chance was further emphasized in the case of *United States v. Rich*, 90 F. Supp. 624 (E. D. Illinois, 1950), where the court stated (pp. 628, 629):

“It would seem that the distinction between the risk or chance involved in a business venture and the lot or chance which enters into the determination of the awarding of a prize in a lottery, gift enterprise, or similar scheme within the meaning of the statute, as pointed out by Judge Grosseup in his instructions above quoted, [*United States v. McDonald, supra*], may properly be said to exist between the risk or chance involved in a wager upon the outcome of a horse race, a baseball game or an election and the lot or chance which enters into the awarding of a prize in a lottery, gift enterprise, or similar scheme. In the former natural forces are determinative, while in the latter artificial forces are determinative, at least in part. So it was that planned artificial forces thwarted skill and caused the machine to be condemned as similar to a lottery under the laws of Massachusetts in *Commonwealth v. Plissner*, 295 Mass. 457, 4 N. E. 2d 241; the

chance drawing of cards determined the outcome of the game 'keno' and caused it to be condemned as a lottery under the federal statute in *Boasberg v. United States*, 5 Cir., 60 F. 2d 185; the business promoting offer of a right to 'pull' a chance of an advantageous purchase condemned as a lottery in *Wolf v. Federal Trade Commission*, 7 Cir., 135 F. 2d 564; the numbers game wherein the players merely guess that the result of mathematical calculations based on prices paid at a certain race track would be a certain prize-winning number held to be a lottery and not a direct bet on a horse race in *Forte v. United States*, 65 App. D. C. 355, 83 F. 2d 612, 105 A. L. R. 300; the promotion sale of foreign bonds through a chance of enhanced return dependent upon lot or chance determined by drawings held to be a lottery scheme in *Horner v. United States*, 147 U. S. 449, 13 S. Ct. 409, 37 L. Ed. 237 and in *United States v. Zeisler*, C. C. N. D. Ill., 30 F. 499; the investment scheme carrying with it a chance of obtaining a low number entitling applicant to a loan on attractive terms held to be a lottery in *United States v. Purvis*, D. C., 195 F. 618; the scheme for increasing subscriptions to a paper whereby all paid-up subscribers received numbered tickets corresponding to numbered coupons which were to be drawn from a box by a blindfolded person, with prizes to be given to holders of certain tickets held to be a lottery notwithstanding that every purchaser of a ticket is repaid his cost by receiving the paper in *United States v. Wallis*, D. C., 58 F. 542; are illustrative of schemes which involved artificial forces affecting the awarding of prizes held to be lotteries by the courts. The awarding of the prizes was by 'lot' or by 'chance', used in a sense closely related to the meaning of 'lot' rather than by 'chance' as that term is involved in a wager on the uncertain outcome of games of skill, or of a horse race, or of an election, wherein natural forces are determinative."

Similarly, in *Matter of Dwyer*, 14 Misc. 204, 35 N. Y. S. 884 (Sup. Ct. 1894), where the court found that a horse racing stake was to be made up by entry fees and by additional sums added by the racing association, the court held that no lottery was involved, stating (p. 204):

“* * * It is not a lottery either in common speech or within legal definition. A lottery depends on lot or chance, such as the casting of lots, the throwing of dice or the turning of a wheel. In the scheme of this race, horse owners do not pay a sum to win a larger sum by lot or chance, but in order to enter into the contest of skill, endurance and speed upon which the stake depends. * * *”

It is manifest that the Plan does not involve a lottery or wager because no participant pays consideration for a “chance” to receive stock, a “prize”, at age 60 in the sense that chance is used in the cases referred to above. If he performs services to age 60, he will receive, in addition to his other Plan benefits, stock as an agreed exchange for that service. Insofar as the stock receivable upon retirement is concerned, the participant who stays with the Company to age 60 furnishes consideration for the stock by serving the Company to that date. To the extent that there might be any slight increase in stock benefits to a retiring participant due to separation of other participants prior to reaching retirement status, it cannot be reasonably contended that such slight increase could even be a factor inducing participation in the Plan. The incidental possibility of such an increase is not the type of chance intended to be prohibited by statutes outlawing lotteries and gambling.

The words of the court in *Ledwith v. Bankers Life Ins. Co.*, (Appellants’ Br. 68) are appropriate (p. 117):

“The retirement plan of the company and the benefits thereunder are a form of contingent deferred compensation for personal services of the employees and an integral part of the wage and salary structure of the Company.”

B. The Stock Provisions Are Inseparable from and Constitute an Integral Part of the Plan.

(See Appellants’ Specification of Error No. 6)

The trial court properly found that the stock provisions of the Plan are an integral part of the Plan and inseparable

from the Plan as a whole (R. 243). As shown above the Penney Company Profit-Sharing Retirement Plan cannot involve a wagering contract or lottery. The trial court properly concluded (R. 251) that the Plan is valid and legal whether the Plan be considered as a whole or whether, as Appellants contend, the provisions regarding stock be separated from the rest of the Plan—an excision which would violate the basic structure of the Plan. The stock received upon retirement constitutes the ultimate benefit designed to compensate participants who complete the full stipulated term of service to age 60.

There is no factual basis for Appellants' contention that the stock provisions should be viewed separately. The Plan was formulated and presented to stockholders as a means of inaugurating a compulsory retirement policy and to provide liberal benefits on retirement and earlier separation. It was also intended to constitute an improvement over the former outright sales of stock from time to time to associates (Ex. 55). The letter of Mr. Sams, then President of the Company, in presenting the Plan to stockholders, stated "Each participant in the fund will be a potential owner of Penney stock and constantly interested in its earning power but will not actually receive any stock unless and until he reaches the retirement age." (Ex. 55)

Dividends from the 200,000 shares of stock purchased by the Trustee from the Company, after payment therefrom of interest on the money borrowed to buy the stock and incidental Plan expenses not borne by the Company, were first applied, together with the Company's 2% of salary contribution for 1940, to cover the cost on the books of the Fund of the 50,000 share block of stock, which cost was covered in September, 1941 (R. 125). Thereafter all dividends were credited to the Dividend Account, and benefits distributed to participants on retirement or other separation have included their shares of the Dividend Account. Through December 31, 1953, \$2,316,228.13 in dividends were distributed as benefits to participants who separated before retirement while participants reaching retirement

status had \$2,124,514.63 in dividends applied toward the purchase of their non-assignable annuities (R. 139). Credits to the Dividend Account have totaled \$17,329,025.32 (R. 138). These figures emphasize the important role dividends on the shares of stock held by the Trust have played in connection with participants' benefits. As compared with the total credits to the Dividend Account, it is interesting to note that the Company's contributions measured by profits under Article 6(b) of the Plan have totaled \$17,986,969.84 (R. 138). The cost of the stock to the Trust was \$6,000,000.

Appellants themselves contend "that the Plan and Trust Agreement constitute one instrument and are to be construed as a whole" (R. 190, par. 8). Appellees agree "that the Plan and Trust Agreement shall be read as an entirety" (R. 193, par. 8).

It is apparent from the early sales of classified stock (R. 94), from later sales of stock at favorable prices (R. 95-98), from Mr. Trown's letter dated November 24, 1939 considered at the Board of Directors' meeting of December 5 and 6, 1939 when the Plan was adopted subject to approval of stockholders (Ex. 2), from the Proxy Statement sent to stockholders prior to the Annual Meeting of March 21, 1940 together with Mr. Sams' accompanying letter (Ex. 55), from the purpose provisions of the Plan (Ex. 125, p. 22) and from the workings of the Plan, that the Plan would not have been adopted without its stock provisions.

The primary purpose of the Company in establishing the Plan could not have been served without the provisions relating to the stock (Hughes, R. 360-367). As Mr. Hughes said in his Statement on Retirement Before 60 Years (Ex. 227A), the 200,000 shares of Penney stock went into the Plan "as its basis and backlog."

None of the general propositions of law and none of the cases cited by Appellants (Br. 67-70) are authority or any justification for the attempt to sever an integral part of the Plan from the Plan as a whole for the purpose of judging that part by itself. All the provisions of the Plan, includ-

ing those for mandatory retirement, distribution of stock to participants reaching retirement status, use of dividends for the benefit of participants leaving the Company upon retirement or earlier separation, participants' contributions and Company contributions, constitute a unified structure. The Plan, without its stock provisions, would be emasculated.

II. ANY IMPLICATION BY APPELLANTS THAT THE DIRECTORS ACTED UNFAIRLY OR IN BAD FAITH IS UNJUSTIFIED.

Appellants made no specific contention in the Pre-Trial Order that the Directors acted at any time in bad faith. However, the implication of such a charge was so evident at the trial that the trial court felt it necessary to hold in its opinion, and to enter a finding to the effect, that there is no basis for attacking the integrity of the executive officers and members of the Board of Directors who were responsible for the adoption of the Plan and its administration (R. 212; R. 245, par. 49; R. 252, par. 14).

Apparently, Appellants' Specification of Error No. 2 (Br. 15, 16) is also intended to convey the implication of bad faith in view of their charge that the Plan was unfair, discriminatory and illegal because older employees (including some Directors who were executives) were among the first to qualify for retirement with stock and received a greater number of shares than younger and future employees will receive when they retire. Here again Appellants did not in any way attack the Plan on this ground in the Pre-Trial Order. The trial court in its opinion concluded that the fact that older employees, among them some members of the Board of Directors, who were among the first to qualify for retirement with stock, received a slightly greater number of shares than younger and future employees will receive when they retire, does not render the Plan unfair, discriminatory, fraudulent or illegal (R. 212).

Accordingly, the trial court entered a Finding of Fact and Conclusion of Law to this effect (R. 244, par. 46; R. 251, par. 13).

Appellants' Specification of Error No. 2 is apparently directed to the formula for distributing stock to retiring participants. The formula works in substance as follows: The number of shares of stock to be received by each retiring participant is determined by the ratio (percentage) which his contributions bear to the contributions of all participants. This ratio is applied to the 450,000 (split) shares and the resulting number so determined is distributed from the 150,000 (split) share block until exhaustion of that block. Upon such exhaustion distributions are made from the 450,000 share block. In determining the number of shares to be distributed from such block each participant's ratio is applied to the shares remaining in this 450,000 share block (R. 235, par. 31C). The Plan contemplates that younger and future employees will upon retirement receive larger credits, as a result of their longer participation, which will tend to offset the larger number of shares received by participants retiring earlier. The effect of the foregoing formula for distribution results in no discrimination whatsoever; rather it serves as a method of equalizing total benefits for retiring participants. Appellants nowhere show or intimate how this manner of distribution of shares of stock under the Plan could possibly render the Plan illegal, discriminatory or unfair. There cannot be any legitimate contention that the trial court was erroneous in finding as a matter of fact that: "There is a sound and logical basis for permitting employees who have not built up large credits for themselves under other provisions of the Plan to receive an advantage in connection with the distribution of stock under the formula set forth in Finding of Fact 31, subparagraph 'C'." (R. 244, par. 46).

Appellants cannot question the propriety of Penney Company executives receiving larger remuneration than

other associates. The annual personal contribution to the Plan of each participant is a uniform percentage of his profit-sharing compensation. Such compensation is determined as a matter of Company policy wholly apart from the Plan and is based on the value of his services to the Company. The stock benefits receivable on retirement as determined by the Plan formula are therefore directly related to the compensation received by each participant.

Directors who were executives were required, along with all other associates receiving compensation, to participate in the Plan (Ex. 125, p. 24). The deep-rooted and well tested policy of the Penney Company as shown by the executive positions held by the directors who served as such since 1939 (R. 98-109) was to have a Board composed of active executives and former active executives. This principle gave the Penney Company the management that from 1940 to 1950 trebled its sales (Ex. 155).

Appellants complain under the heading "Participation by Executive Group" (Br. 27) of the power of the Company officials to discharge employees and their failure to permit early retirements.

There is no evidence or claim by Appellants that the power of discharge was ever wrongfully exercised. As established in *Gardner-Denver Co. v. Commissioner* (*supra*, p. 35), the possibility of the company officials abusing that power should not be considered. Furthermore, there is no evidence in the record of any improper conduct on the part of the Board of Directors with respect to the provision for optional retirement in former Article 8(c) of the Plan which was eliminated by amendment in 1948 (Ex. 127, Sec. III, p. 5, Questions and Answers No. 24).

Under the heading "Participation by Executive Group" Appellants cite *Winkelman v. General Motors Corp.* (Br. p. 30). That case, a stockholder action, was concerned solely with the fiduciary obligation of directors to stockholders and has no relevance to the issues in this case. The directors amended a bonus plan so as to provide that forfeited bonus stock should revert principally to their benefit

instead of to the benefit of the corporation and stockholders. This action was taken without the consent of stockholders and was never reported to them either at any meeting or in the annual reports. The Court held in condemning such action that the directors had violated their fiduciary obligation to the stockholders.

III. THE TESTIMONY OF ALBERT W. HUGHES WAS PROPERLY ADMITTED IN EVIDENCE.

There is no merit to Appellants' Specification of Error No. 4 (Br. 16, 17) or their argument (Br. 53-60) that the trial court erred in admitting in evidence over objection certain testimony of Albert W. Hughes, President of the Penney Company. The witness was asked on direct examination:

“Do you know the reason why there was included in the Profit-Sharing Retirement Plan the provisions for stock being issued to participants who left on the retirement age?” (R. 355)

Opposing counsel objected to the question on the ground that it was an attempt to vary the written Plan as adopted and was immaterial to any issue raised (R. 355, 356). Later, after Mr. Hughes, in answering the question, had given a substantial amount of testimony regarding the background of the Plan, opposing counsel interrupted, saying:

“If your Honor please, the question asked of the witness is why they put stock in the Plan. We are now getting a lecture on the whole subject. I object to it as immaterial, *but if your Honor wants to hear it, it is all right with me.*” (R. 364) (*Italics ours*)

It thus appears that Appellants withdrew their objection, and accordingly this Court need give the matter no further consideration. In any event, there are other conclusive reasons why Specification of Error No. 4 is not well taken.

The parties are in agreement that the Plan constituted a contract between Penney Company and the participants

(R. 189, par 2; R. 191, par. 1). The testimony of Mr. Hughes was not introduced for the purpose of varying, nor did it vary, the terms of the Plan. This testimony showed the circumstances leading to the preparation and adoption of the Plan together with the legitimate reasons for including the stock provisions.

Under Oregon law and other applicable authorities Mr. Hughes' testimony was properly admitted to show the circumstances under which the Plan was made and adopted.

ORS 42.220 provides:

“42.220 Consideration of circumstances. In construing an instrument, the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language he is interpreting.”

In *West v. Conrad*, 177 F. 2d 252 (9th Cir. 1949), the court, in passing upon the validity of a lease of property for use as a “Guest House or for any other lawful purpose”, which was seemingly in violation of the Housing and Rent Act of 1947 because of the amount of rent specified in the lease, held admissible extrinsic evidence showing that the tenant intended to use the premises for business and not housing purposes. This Court stated (p. 253):

“* * * Parol evidence is admissible to show the legality or illegality of a contract. * * *”

In *Patterson-Ballagh Corp. v. Byron Jackson Co.*, 145 F. 2d 786 (9th Cir. 1944), a California statute similar to the Oregon statute was involved under which it was held (p. 790):

“Parol evidence then seems here to be admissible for the dual purpose of determining the true consideration and of placing the court ‘in the same situation in which the parties found themselves at the time of contracting.’ ”

In *Aron v. Gillman*, 309 N. Y. 157, 128 N. E. 2d 284 (1955), the court stated (p. 163):

“It is well settled that in construing the provisions of a contract we should give due consideration to the circumstances surrounding its execution, to the purpose of the parties in making the contract, and, if possible, we should give to the agreement a fair and reasonable interpretation (3 Corbin on Contracts, pp. 78-79, 88-91, 115; 3 Williston on Contracts, pp. 1780-1788).”

Appellees did not and do not urge that a lottery conducted for the benefit of charitable organizations or for the promotion of business is therefore not a lottery (Appellants' Br. 53-60). The testimony of Mr. Hughes as to the legitimate business purpose underlying the adoption of the Plan, including the provisions regarding the stock (found by the trial court to be an integral part of the Plan; R. 243, par. 43), was admissible because in the determination of whether or not a particular enterprise involves a lottery, it is necessary to inquire into its purpose, effect, and all its operative facts. Only by having such knowledge can the court determine whether a challenged enterprise contains the evils lottery laws are intended to prevent, and whether the type of chance involved is the kind characteristic of a lottery or is merely a normal business risk in connection with a legitimate enterprise.

The pertinency of an inquiry into business purposes is illustrated by *United States v. McDonald* and *United States v. Rich* (this brief, pp. 36, 38), where the courts referred to the difference between normal business risk and the type of chance involved in a lottery. See also *Public Clearing House v. Coyne*, 194 U. S. 497, 515, 24 S. Ct. 789, 48 L. Ed. 1092 (1904), where the Supreme Court of the United States, in determining that the scheme under consideration involved a lottery, specifically emphasized the absence of legitimate business purposes in the scheme.

Throughout this case the parties proceeded upon the basis that extrinsic evidence was proper for the purpose of showing the circumstances under which the Plan was adopted, the reasons for the inclusion therein of the stock provisions and the manner in which the Plan operated.

Prior to the introduction of Mr. Hughes' testimony, Appellants had introduced numerous exhibits relating to these matters (R. 264). Such exhibits included the following:

Ex. 2, minutes of the directors' meeting of December 5th and 6th, 1939, at which the Plan was adopted, together with the letter of R. W. Trown, then Comptroller, submitting the Plan to the Board and setting forth the Plan, a summary and explanatory references.

Ex. 55, explanatory letter of Mr. E. C. Sams, then President of the Company, and the other proxy material sent to stockholders in connection with the annual meeting of March 21, 1940, when the Plan was approved by stockholders.

Exs. 74-77, excerpts from the minutes of stockholders' and directors' meetings held in 1935 and 1936 at which it was decided to issue stock to Company associates on advantageous terms.

Ex. 123, the document explaining the Plan and the reason for its adoption, which was submitted to the directors prior to the adoption of the Plan.

Ex. 125, the booklet in which appears the Plan and Trust Agreement as originally issued to participants. The booklet includes an outline of the Plan and sets forth questions and answers relating to it.

Before Mr. Hughes gave his testimony, Appellees had introduced Ex. 227-A (R. 340-344) containing detailed evidence concerning the reasons for inclusion of the stock provisions and Appellants made no objection to this exhibit.

The Statement of Agreed Facts in the Pre-Trial Order also contained extrinsic evidence relating to the Plan to which Appellants made no objection, although machinery was provided in the Pre-Trial Order for such objections to be made on the ground of irrelevancy or immateriality (R. 91). For example, there was set forth in full in the Pre-Trial Order (R. 110-113) a letter dated December 26, 1939, from Mr. E. C. Sams addressed to Managers and Central Office Executives in which Mr. Sams gave the reasons for and purposes of the Plan. It should also be

noted that the charts appearing in paragraphs 38, 39, 40, and 40-A (R. 128-137) of the Pre-Trial Order, dealing with the financial operations of the Plan, were, as paragraph 42-A of the Order recites (R. 145), submitted on behalf of Appellants.

Much of the above evidence was introduced by Appellants in an attempt to establish a foundation to attack the good faith of the directors in adopting the Plan. Appellants stress (Br. 23-32) the fact that officers and directors serving in executive capacities participated in the Plan, derived benefits from it, and that some of them retired with shares of stock. Appellants contend (Br. 27-28) the men in the "governing groups of the Company" possessed "unlimited and arbitrary power over the employment of every participant". Appellants further state (Br. 28) that this "placed such persons in a position in which their duties to participants conflicted with their self-interest or with their interest in the Company." These references in Appellants' brief taken together with their presentation of the case at trial create a definite implication of a charge of bad faith against the officers and directors.

Appellants having introduced evidence in an effort to attack the integrity of Penney Company officers and directors in formulating and carrying the Plan into effect, Appellees had the right to introduce evidence relative to this subject. The trial court properly ruled: "I will consider the testimony of Mr. Hughes with reference to his intentions, at least." (R. 397)

Even if the testimony above discussed had been erroneously introduced, the error was invited by Appellants and will not be reviewed.

In *Hamilton v. Hamilton Mammoth Mines, Inc.*, 110 Or. 546, 223 Pac. 926 (1924), the court held there was no reversible error in permitting evidence to be introduced to meet evidence on the same subject introduced by the other party. It explained the basis of its decision as follows (p. 550):

“The only alleged error brought to the attention of the court in the bill of exceptions is a question propounded to the plaintiff by his attorney in rebuttal. This question called for testimony intended to meet the testimony adduced by the defendant in support of defendant’s affirmative answer. The defendant cannot, therefore, be heard to complain of the court’s action in permitting the question to be answered. The question and answer were probably immaterial, but the error, if any, was harmless. A litigant is not permitted to object to the testimony adduced by his antagonist to meet immaterial testimony theretofore introduced by the former. In any event, the evidence was harmless and the case having been tried to the court, without the intervention of a jury, reversible error was not thereby committed.”

Likewise, in *Richardson v. Portland Trackless Car Co.*, 113 Or. 544, 233 Pac. 540 (1925), which was an action to recover damages for personal injuries sustained by plaintiff while riding in a motor bus of defendant, the court stated (p. 551):

“Over defendant’s objection the court permitted witness to answer the following question:

“‘Supposing a man is standing in the car, in the aisle, near the door, but not against it, and you are running the car a little lively and run into a rough place in the pavement, say you are going at a rate of fifteen miles an hour, and the car lurches to one side; is that a safe place for him to be in?’

“This is not a subject for expert testimony, and was a clear invasion of the province of the jury; but counsel for defendant cannot complain in view of the fact that he had previously asked this witness if there was plenty of room for people to stand in the bus and whether they could stand safely. Error when invited will not be reviewed: *Oregon-Washington R. & N. Co. v. Spokane P. & S. Ry. Co.*, 83 Or. 528 (163 Pac. 600, 989, Ann. Cas. 1918C, 991).”

If for any reason the testimony of Mr. Hughes was not technically admissible, nevertheless its admission was

harmless error. The Court of Appeals gives consideration only to such evidence as is competent and material to the issues and therefore the introduction of immaterial or irrelevant evidence in a case tried before a judge without a jury is not reversible error where there is other evidence to support the judgment. See *Bailey v. Sears, Roebuck & Co.*, 115 F. 2d 904, 907 (9th Cir. 1940); *Jackson Furniture Co. v. McLaughlin*, 85 F. 2d 606, 609 (9th Cir. 1936); *El Paso & S. W. R. Co. v. Phelps-Dodge Mercantile Co.*, 75 F. 2d 873, 879 (9th Cir. 1935); *Bodkin v. Edwards*, 265 Fed. 621, 623 (9th Cir. 1920); *Cascaden v. Bell*, 257 Fed. 926, 930 (9th Cir. 1919).

The record in the case before this Court is replete with evidence apart from Mr. Hughes' testimony which conclusively establishes the validity of the Profit-Sharing Retirement Plan and supports the judgment of the trial court.

All question as to the admissibility of Mr. Hughes' testimony is put at rest by Rule 61 of the Federal Rules of Civil Procedure, which provides in part:

"The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

In *Ryno v. United States*, 232 F. 2d 581, 584 (9th Cir. 1956), this Court stated the well established rule that:

"In reviewing a judgment in an appellate court, the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial. *Simpson v. United States*, 9 Cir., 289 F. 188, 191. No such showing has been made here."

The Appellants have not shown and cannot show how the testimony of Mr. Hughes could be prejudicial in any way.

IV. APPELLANTS' CONTENTION THAT THERE SHOULD BE A RESULTING TRUST IN FAVOR OF 1940 AND 1941 PARTICIPANTS CANNOT BE SUSTAINED.

(See Appellants' Specifications of Error Nos. 5 and 7.)

A. The Manner of Acquisition of the Stock by the Trustee Cannot Entitle Appellants to any Relief.

In an attempt to support their argument for a resulting trust, Appellants make the contention that the 200,000 shares of stock were purchased by the Trustee with the earnings and compensation of 1940 and 1941 participants (Br. 3, 70-79; Specification of Error No. 5, Br. 18).

Their contention is urged, not to support their assertion that the stock provisions of the Plan are invalid, but in support of the relief they claim should be granted if their contention of illegality should be upheld. Unless the Court should determine that the Plan is invalid, the resulting trust discussion in Point II of Appellants' brief is irrelevant.

Appellants' statement of the facts in support of their resulting trust argument contains assertions that are inaccurate or involve unwarranted implications.

Appellants assert that the earnings and compensation of the former managers and management staff members "were used to purchase 200,000 shares of the stock of J. C. Penney Company (later split 3 for 1)" (Br. 3). This assertion is not accurate. The stock was purchased with the proceeds of a loan to the Trustee made by the Continental Bank, and the loan was repaid out of Fund assets by December 29, 1941 (R. 226, par. 19, R. 229, par. 23).

The Fund assets so used originated in four sources: (1) participants' contributions; (2) the Company's 2% contribution measured by salaries; (3) the Company's 6% of profits contributions; and (4) dividends on the

200,000 shares of Company stock purchased by the Trustee. As the trial court found and concluded, once these moneys passed into the hands of the Trustee they lost their separate identity and became assets of the Fund. The use of Fund assets to repay the loan was in accordance with the Plan and Trust Agreement (R. 229, 230, pars. 23, 25).

The Plan (Ex. 125, Art. 5, pp. 24, 25) and the Trust Agreement (Ex. 125, Art. Fourth, p. 39) specifically authorized the Trustee to borrow \$5,700,000 from Continental Bank to provide funds to pay the Penney Company for the 200,000 shares of stock and to pledge as security for the loan all assets in the Fund including the Company stock. The Trust Agreement (Ex. 125, Art. Fourth D, p. 40) provided that all dividends on such shares of stock and all contributions received from the Company or from participants should be paid to Continental Bank as received on account of the principal and interest of the loan, except a sum not to exceed \$150,000 to be retained by the Trustee as working funds.

Such loan was in fact negotiated on August 1, 1940, and, as stated above, by December 29, 1941, it was repaid in full by the Trustee out of funds in its possession (R. 229, par. 23). While the loan was being repaid, every dollar of the Company's 6% of profits contributions and every dollar of participants' personal contributions were credited to their account (R. 235). As the trial court found (R. 230), use of the Trust Fund assets to pay the loan, interest and expenses did not interfere with making all credits to the accounts provided for by the Plan in strict accordance with the provisions thereof. The trial court further found (R. 230) that at all times from August 1, 1940, through December 31, 1953, the resources of the Trust were sufficient to satisfy the credits of all participants. Appellants agreed in the Pre-Trial Order (R. 177, par. 80) that each participant whose participation ceased prior to reaching retirement status received from the Trust an amount equal to the aggregate of his own contributions and in addition

the other credits from the Fund to which he was entitled under the Plan.

The repayment of the loan had nothing to do with covering the cost of the 200,000 shares of stock on the books of the Fund. As explained below, such cost was to be covered ultimately by the earliest dividends on such shares and by the Company's 2% contribution measured by salaries.

Appellants assert (Br. 9, 10) that the Penney Company itself assumed no liability with respect to payment of the stock loan, nor did it guarantee its payment, nor did it execute a hold harmless or indemnity agreement with the Trustee or with the Bank.

It is not true that the Penney Company assumed no liability with respect to the loan. The loan agreement here referred to was executed July 25, 1940, between Continental Bank, the lender, Chase National Bank, as Trustee, and the Penney Company. The sixth paragraph thereof included in part the following provisions:

“Penney hereby agrees with the [Continental] Bank that, so long as said note evidencing the said original loan shall be unpaid in whole or in part or there shall be any other outstanding and unpaid indebtedness of the Trustee to the Bank, Penney will, annually and promptly, make the contributions, provided to be made by it under the Plan as now in force, in cash at or before the times, in the manner and in the amounts so provided in said Plan, and that Penney further will not reduce the amount of its contributions, provided to be made by it under the Plan as now in force, below the amounts which are required to be contributed by it, from time to time, under the Plan as now in force, and that Penney further will not discontinue making the contributions, provided for under Section 6(a) of the Plan as now in force, regardless of the amount of the ‘Reserve for Retirement account’ and will not exercise any rights, granted to it under Section 15 of the Plan as now in force, to decrease or dispense with any Company contribution called for under the Plan as now in force or to substitute any form of stock or securities for cash contributions.”

(R. 373, 374; Ex. 210)

In addition, the Trust Agreement (Ex. 125, Art. Fourth G, p. 41) reads as follows:

“The Company shall not consent to, or take any steps to accomplish, the termination or discontinuance of the Plan or this agreement of trust at any time at which there shall be any outstanding indebtedness or liabilities of the Trustee to the Bank in connection with its loans to the Trustee as herein provided.”

In other words, until the loan was repaid there was an absolute obligation on the Penney Company to maintain the Plan in effect and to continue its contributions called for by Art. 6(a) of the Plan in an amount equal to 2% of the aggregate regular salary paid to all employees receiving compensation during the preceding year and the contribution called for by Art. 6(b) in the amount of 6% of the Company's net profit for the prior year in excess of 15% of the common stock book value of the Company.

Appellants assert (Br. 10, 11)—“During this time [prior to the repayment of the loan] when participants' funds were completely utilized for the payment of the loan used to purchase the shares, such funds were not available for other investments for the benefit of participants.” Use of the assets of the Fund to repay the loan was strictly in accordance with the terms of the Plan to which all participants had agreed (R. 231). Moreover, no participant, however quickly he separated from the Company after the adoption of the Plan, failed to receive at least all his personal contributions plus his share of the Company's 6% of profits contribution for every full year in which he participated in the Plan. The example used by Appellants is the case of Mr. McAlpine, who separated on August 31, 1941. Mr. McAlpine contributed \$4,278.38 and on separation received \$4,635.05, an increase of \$356.67, or 8% of his personal contributions (Ex. 292). Due to the fact that Mr. McAlpine separated in August, rather than at the end of the year, under the terms of the Plan he did not participate in the

Company's 6% of profits contribution for 1941 (Ex. 292). After the cost of the 50,000 shares of stock was covered in September, 1941, explained below, dividends were credited to the Dividend Account in which all participants separating after September 1941 shared. The date September 1951 (Appellants' Br. 12, 3rd line from bottom) is incorrect.

Appellants assert (Br. 11, 12) that while the loan was being repaid during 1940-1941, the participants bore the entire risk in the event the Bank foreclosed on the stock held by the Trustee and that a vast discrepancy existed between the credits absolutely vested in and due participants and the cash held by the Trustee. Since the principal on the note was not due until August 1, 1943 (Ex. 211), the possibility of such foreclosure occurring during 1940 or 1941 was purely fanciful. Furthermore, as in the case of a bank, the Trustee maintained on hand sufficient cash to meet all anticipated withdrawals (Ex. 292, R. 137), and no importance attaches to the circumstance that the Trustee did not maintain sufficient cash on hand to meet its obligations to all participants "had they chosen voluntarily to withdraw, or if the Plan had failed for any other reason."

The Plan, the Trust Agreement, the Loan Agreement (Ex. 210), and Note (Ex. 211) contained provisions to insure that the use by the Trustee of the moneys received by it to repay the loan would not interfere (and in fact it did not interfere) with the Trustee's ability to make whatever payments might be required in accordance with the credits to the various accounts under the Plan to participants who might leave the employ of the Company in the early years of the Plan. Those provisions, in substance, were as follows (R. 228, par. 21):

(1) The Trustee was authorized by the Trust Agreement, Article Fourth E, and the Note that it delivered to the Continental Bank to retain, out of the cash received by it, \$150,000 for working funds.

(2) The Loan Agreement, paragraph 2, provided that the Bank at any time after the principal of the loan had been reduced to \$4,500,000 or less would make a new loan to the Trustee up to \$500,000 and would also release to the Trustee up to 10,000 shares of Penney Company stock.

(3) Under the terms of the Plan, Article 5, and Trust Agreement, Article Fourth B, Eighth A, the Trustee was authorized to reborrow from the Continental Bank, after any partial repayment of the original loan, up to \$5,700,000 (including any unpaid balance of the original loan) and, after complete repayment of any loans from the Continental Bank, to borrow without restriction on the security of the assets in the Fund such amounts as might be required to carry out the purposes of the trust.

The Trustee paid the loan down to \$4,200,000 on the very day that the loan was made. It did not at any time become necessary for the Trustee to borrow additional funds from the Continental Bank or from any other source. Both prior and subsequent to the repayment of the loan, the provisions set forth above constituted a resource of the Fund available to the Trustee to obtain additional cash if any had been necessary to pay the credits of participants withdrawing from the Plan. (R. 228, par. 21)

That the cash assets of the Trustee were substantially below the amounts that would have been due all participants had their participation ceased on or prior to December 29, 1941, resulted in no substantial risk to participants. On December 29, 1941, when the Trustee completed repayment of the loan of \$5,700,000, the Trustee held in addition to \$389,565.61 cash (R. 137) the 200,000 shares of Penney Company stock free and clear. Significantly, Appellants omit to mention that the stock so held then had a market value of approximately \$15,400,000 (R. 119). Participants' credits, less withdrawals by participants prior to December 29, 1941 (R. 137), then totalled \$4,888,306.22 (R. 138).

Thus, if, as suggested by Appellants, all participants had resigned or died on December 29, 1941, the Trustee would have had to meet obligations of \$4,888,306.22. With \$389,565.61 (R. 137) cash then on hand, the Trustee would have had to borrow the difference, or, \$4,498,740.61. The Trustee could easily have done so on the security of the Penney stock then worth approximately \$15,400,000 (R. 119). Of course no such contingency ever arose. It puts a ridiculously excessive strain on the imagination to visualize circumstances under which 1,731 associates of the Penney Company (R. 167), store managers and associates in the central and branch offices, would have resigned or died on the same date.

At all times from August 1, 1940, through December 31, 1953, the last full calendar year for which figures are set forth in the Pre-Trial Order, the resources of the Trust were overwhelmingly sufficient to satisfy the credits of all participants. On August 1, 1940, the date the Trustee paid \$5,700,000 for the 200,000 shares of stock, their market value was \$80 per share, or \$16,000,000 (R. 229), thus providing on that date a buffer of over \$10,000,000 of security. Between August 1, 1940, and December 29, 1941, the date when the loan was fully repaid, the price of Penney Company stock ranged from \$73 to \$92 per share (R. 119), the stock thus having a value of between \$14,600,000 and \$18,400,000 (R. 229, par. 22).

While Appellants seem to have confined to the period between August 1, 1940, and December 29, 1941, their fears concerning the alleged discrepancy between credits to participants and cash held by the Trustee, it may be well to point out that no question of the solvency of the Plan can be raised during any period subsequent to December 29, 1941. At no time between that date and January 16, 1946, when the stock was split three-for-one, did the price of Penney Company stock fall below \$57 per share; since that split the stock has never been below \$36 per share, or \$108 per original share (R. 119).

On December 31, 1953, participants' credits amounted to \$65,636,598.36. On the same date the assets of the Fund, exclusive of the 483,754 shares of Penney Company stock, consisted of cash on hand, receivables, government bonds, and deferred annuities amounting to \$63,286,595.59. The difference of \$2,350,003.77 represents the remaining uncovered cost of the original 150,000 share block of stock to be covered by the Company's 2% contribution measured by salaries. (R. 147, 241)*

The Company has had an unbroken profit and dividend record from the time of its incorporation in Delaware in 1924 (R. 241, par. 39). Its predecessor, the Utah corporation, incorporated in 1913, had an unbroken profit record except for the year 1920 (Hughes, R. 375, 376). Sales for 1913 were \$2,637,293.72 (Ex. 154), increasing steadily over the years to sales of \$304,539,325.64 and net income of \$16,230,608.84 in 1940 (Ex. 145). For the year 1950 (Ex. 155—the last annual report in evidence) sales were \$949,711,735.43 and net income was \$44,930,816.28.

* Appellants assert that each participant is required to contribute annually to the Plan one third of his compensation (as defined in the Plan) exclusive of regular salary (Br. 7). This was true only for the years 1940 and 1941. Contributions by participants from their 1939 compensation were not required but were voluntary up to 33⅓%. Because of increased Federal Personal Income taxes, the percentage of each participant's contribution for 1942 and subsequent years was reduced to 20% of his annual compensation (R. 225, par. 15; R. 233, par. 30A).

Appellants assert (Br. 7) that the Company is required annually to contribute an amount equal to 6% of the Company's net profit for the prior calendar year in excess of 15% of the common stock book value of the Company. This is correct for the period through 1949 except that net profit was computed before the deduction of this contribution. For each of the years 1950 through 1953 the profit sharing contribution was changed to 2% of the Company's net profit before Federal taxes and before the Company's contribution to this Plan and to its Thrift Plan. (R. 234)

In terms of its ability to meet its obligations, the Plan is and at all times has been fully solvent. Realistically considered, there has been no risk to participants.

In analyzing Appellants' argument that the stock was bought with participants' funds, it is necessary to bear in mind that the stock provisions of the Plan have a two-fold function.

First, the stock is an asset of the Trust Fund. Dividends received on it are, in effect, income of the Fund. They are credited to the Dividend Account for the benefit of all participants. Because of such dividends, participants leaving the Company on retirement or earlier separation receive larger annuities. The Plan, instead of including the provision for purchase of the stock, might have provided for trust assets to be invested exclusively in Government bonds. That would also have been a sound investment, but the rate of return would have been low. By enabling the Fund to purchase shares of Penney stock at \$50 a share below the market price, the Company provided the Fund with a safe, and at the same time lucrative, investment. As already pointed out (Point I, B, *supra*), against an original cost of \$6,000,000, credits to the Dividend Account for the benefit of participants have amounted in the aggregate over the years to more than \$17,000,000.

Second, the Plan provides for the distribution to participants attaining retirement status, out of the Company stock held in the Fund, of a number of shares determined in accordance with the Plan formula. The shares are intended to supplement the annuities received on retirement and thus furnish an additional source of security for participants in the later years of their lives.

In considering the stock feature of the Plan it is necessary to distinguish between the matters discussed in subparagraphs (i), (ii) and (iii) following:

- (i) The use of trust assets to repay the loan used to acquire the stock.

Purchase of the Penney stock by the Trustee constituted investment of a portion of the Fund. The Trustee, in the first instance, borrowed the money to pay for the stock. It then used trust assets to repay the loan. This transaction did not differ in principle from an investment in Government bonds. Like such an investment, it produced income for the Fund but with a higher rate of return. Whether the trust assets had been invested in Company stock or in Government bonds, there would have been no difference in the amounts credited in accordance with the Plan to the accounts of individual participants from the Company's contribution based on profits and from participants' personal contributions.

(ii) The credits to the accounts of the participants.

It is the credits to participants' accounts which determine the amount of cash or annuities they receive on retirement or other separation (R. 238, pars. 32, 33, 34, Ex. 125, 29-31). The amounts of the credits provided by the Plan to be made to their accounts were not affected in any way either by the investment of trust assets in Penney stock (except advantageously in view of the lucrative yield on that investment) or by the manner in which the cost of the stock was covered on the books of the Fund.

(iii) The manner in which the cost of the stock was to be covered on the books of the Fund.

Since the Trustee was to purchase the stock for cash (i.e. at a cost of \$30 per share, less adjustment for dividends of \$1.50 per share paid by the Company between January 1 and August 1, 1940, which were to be considered as a receipt of dividends in that amount), it was necessary to include in the Plan provisions whereby the cost would be covered on the books of the Fund so that shares might be distributed to retiring participants without charge (Ex. 125, Art. 5, pp. 24, 25, Art. 10, pp. 29, 30). These provisions were separate and distinct from those for the repayment of the loan.

As provided by Article 7(c) of the Plan, the original 200,000 shares of Penney Company stock were separated in the Fund's accounts into two blocks—one of 50,000 shares and one of 150,000 shares with actual cost applied to each block, after the dividend adjustment provided for under Article 5 of the Plan (Ex. 125, p. 26, R. 235-237).

The \$1,500,000 cost of the original 50,000 share block was to be covered by the Company's 2% contribution measured by salaries under Article 6(a), and by the earliest dividends (including the \$300,000 adjustment for dividends paid between January 1 and August 1, 1940) on all of the 200,000 shares of stock, after payment from such dividends of interest on the money borrowed to purchase the stock and incidental Plan expenses not borne by the Company (Ex. 125, Art. 7(d), (e), p. 26, R. 235-237).

The \$4,500,000 cost of the original 150,000 share block was to be covered solely by the annual 2% of salary contribution through the medium of the Reserve for Retirement Account to which account such contributions were credited annually after the cost of the 50,000 share block was covered. After the cost of the 150,000 share block is covered, the 2% of salary contribution will terminate. (Ex. 125, Art. 6(a), p. 25, R. 237, par. D.)

It was because of these specific provisions in the Plan with regard to application of the 2% of salary contribution and the earliest dividends on the 200,000 shares that no participants received credits to their accounts from them. Participants were given full information with regard to these provisions, not only in the Plan but also in the Questions and Answers and Outline (Ex. 125, p. 26, 5, 12, 13), and agreed to them (R. 231, par. 27).

The Plan was operated precisely in accordance with the provisions to which we have referred (R. 237, pars. D, E).

The \$1,500,000 cost of the 50,000 share block was entirely covered by September, 1941 by the Company's contribution for 1940 measured by salary under Article 6(a) of the Plan, amounting to \$102,206.97, and dividend credits of \$1,397,793.03. Company contributions measured by salary

under Article 6(a) of the Plan for succeeding years were and are being credited to the Reserve for Retirement Account to cover the \$4,500,000 cost of the 150,000 share block. As at December 31, 1953 the Reserve for Retirement Account amounted to \$2,149,996.23, leaving a balance of \$2,350,003.77 to be received from the Company in the form of its annual contributions under Article 6(a). Dividends received by the Trustee by September, 1941, not needed in covering the cost of the 50,000 share block, and exclusive of the dividends of \$40,239.60 (R. 138, 5th column) used to pay off interest on the loan and incidental expense not borne by the Company, and all dividends received by the Trustee thereafter were credited to the Dividend Account (R. 237, pars. D, E; R. 147).

It is clear that the entire cost on the books of the Fund of the original 200,000 shares of stock will be covered solely by payments made by the Company to the Trustee which, under the terms of the Plan, are to be applied exclusively for that purpose. Earliest dividends, together with the Company's contribution measured by 2% of salary, were required to be and were applied by the Trustee to the cost of the original 50,000 share block until that cost was entirely covered, and thereafter the Company's 2% of salary contribution has been and must be, by the specific terms of the Plan, applied to the cost of the original 150,000 share block. No contributions by participants have been applied to the cost of covering such stock. The Company has paid and is paying the cost of the stock. No trust can result in favor of Appellants on their theory that their funds were used to cover the cost of the stock.

The general propositions of trust law cited by Appellants (Br. 64-66) lend no support to their argument that there should be a resulting trust in their favor. We have shown that Appellants have not paid any part of the cost of the stock. If, as seems inconceivable, the Court should hold the Plan invalid, then, in view of the fact that the entire cost of the stock is being paid by the Company, additional court proceedings would be necessary

to determine the proper disposition of the stock now held in the Fund.

Appellants' cases (Br. 62-64) involve professional gambling, having to do with bets on races and other sporting events, and are not in point. In each case the recovery was only the dollar amount advanced by the bettor to the stakeholder. In the *Bamman* case (Br. 63), the court specifically stated that the bettor could never recover winnings. Appellants' characterization of the 200,000 shares of stock as a "prize" (Br. 53) would by itself preclude Appellants from recovery of any of these shares under the authorities they have cited. Appellants have already received back not only every dollar of their own personal contributions but other benefits in addition.

B. Company Contributions to the Trust Constitute Deferred Compensation to Participants Only Under the Conditions Provided by the Plan.

Appellants (Br. 70-79) seek to strengthen their argument for a resulting trust by contending that all Company contributions constituted current compensation to participants. They advance the following propositions:

"At the end of each year as such contributions (Company contributions under Article 6(a) and 6(b) of the Plan) are accrued, they become vested compensation earned by participants (Br. 77).

"Thus, under state substantive law and under federal and state tax law, all the funds used by Trustee to purchase the Penney stock were the earnings of participants at the end of each year in which accrued" (Br. 79).

Appellants' propositions are not in accord with the law or the facts.

The Company contributions constitute deferred compensation subject to the terms and conditions of the Plan. No participant had a right to receive any of such compen-

sation either in cash or in stock except in accordance with the Plan's conditions (R. 252, 253, pars. 16-18). All moneys used to pay the loan with which the stock was purchased had come into the hands of the Trustee to be used solely in accordance with the Plan and Trust Agreement and retained no separate identity except as assets of the Fund (R. 230, par. 25; this brief). Calling the funds used by the Trustee to repay the loan "earnings of participants at the end of each year in which accrued" (Br. 79) cannot remove the conditions under which they came into the Trust Fund, or vary the terms of the Plan governing their disposition.

Appellants in their brief (77) state:

"The profit-sharing contribution under Section 6(b) of the Plan and the 2% of aggregate salaries contributions under Section 6(a) of the Plan are 'treated as though they were in the Fund at the end of the year in which * * * earned.' 'Company contributions are credited to participants' accounts on this accrual basis' (R. 146)."

This is not an accurate statement of what appears in the Record at p. 146, and is misleading. The Record there states (par. D(ii)) that the Company contributions under Article 6(b) of the Plan

"are upon an accrual basis, that is to say, Company contributions have been treated as though they were in the Fund at the end of the year in which were earned the profits upon which such contributions were based rather than in the subsequent year in which such contributions were paid to the Trustee."

The statement at R. 146 has no reference to the year in which contributions were "earned" by any participants, but refers solely to the year in which were earned the Company profits, upon which the Company contributions under Article 6(b) were based.

Under the terms of an employees' benefit plan the participants' interests in the assets held by the trustee may

remain contingent prior to a specified date or prior to their reaching retirement age.

Rev. Rul. 33, C. B. 1953-1, 267, 280, provides as follows:

“(b) *Vested rights in employer's contributions.*—The Code does not require that an employee be granted immediate vested rights in his employer's contributions as a condition for qualification of a plan. Various provisions for vesting are in use, ranging from complete and immediate vesting through different forms of graduated vesting, upon completion of stated service or participation requirements, to no vesting until attainment of normal or stated retirement age.”

A case closely in point is *Schaefer v. Bowers*, 50 F. 2d 689 (2d Cir. 1931). The plaintiff, Schaefer, an employee of Standard Oil Company of New Jersey, became a participant in a stock subscription plan inaugurated by that company on December 30, 1920 for a period of five years. The Plan was an exempt employees' trust under the Internal Revenue Code. The plan provided that an employee might contribute to the fund under the plan up to twenty per cent of his pay to which the company would add one-half. Trustees were to receive such joint contribution and from time to time purchase shares of the company's stock. Title to the shares was to be in the trustees, but the shares were to be credited on the trustees' books to the employees in proportion to the joint contribution. Judge Learned Hand, in describing the Plan, stated (at p. 690);

“(1) An employee might remain in the service of the company and withdraw from the fund. In that case he got back only his own deposits with interest, or if the trustees so decided, an ‘equivalent thereof’ in shares at their average cost. (2) He might leave the employer's services voluntarily, or be ‘discharged for good cause (of which the trustees shall be the sole judges).’ In either event he should also have only his money back with interest, or ‘at the option of the trustees,’ an equivalent in shares. (3) He might be retired or quit ‘on account of total disability or for other satisfactory cause (of which the trustees shall

be the sole judges),’ or he might be discharged through ‘no fault of his own.’ In either of these cases he was to receive the full amount of the shares to his credit at the time. If he died, his successors had the same rights.”

The plaintiff had made contributions during the five year period and received certain shares of stock as his distribution. The issue involved was the manner in which the stock was to be treated for income tax purposes. The court stated (p. 691) that this issue “turns upon the character of the employee’s interest in the fund before distribution.” The plaintiff’s argument was to the effect that “when the trustees bought shares of stock by means of the joint contribution of employer and employee, they became his in equity” and were his property at that time. The court rejected this argument, stating in part (p. 691):

“When shares were unconditionally allocated to an employee under a kindred scheme, we held that they were taxable when credited to him (*Rodrigues v. Edwards*, 40 F. (2d) 408), but here the employee’s right to anything but his own contribution was conditional until the period expired. * * *

“We rely first upon the fact that the right, whatever it was, was conditional on the employee’s continuance in the company’s service for five years. The plaintiff answers that this was a condition depending wholly upon his own volition, and cannot properly be regarded as a condition at all. We cannot agree. He might be discharged, and the trustees were to be the ‘sole judges’ whether or not it was for ‘good cause.’ It is idle to say that a man subject to discharge for reasons resting in the decision of a third person, voluntarily abandons the service, because his discharge presumably depends upon his own conduct. He may prove incompetent, or arouse the displeasure of his employer for reasons of which he could not anticipate such a result. Even though the decision of the trustees was subject to eventual review in cases of plain abuse, the occasions for its lawful exercise might be such as he could not control or foresee.

“Moreover, even if it can be thought that any discharge is voluntary, still his rights changed upon dis-

tribution. Until then, his interest was charged with the obligation to remain; that is as true a condition as though his employment did not rest in his pleasure. Practically it might prove onerous; he might find it much to his advantage to go elsewhere, but his decision to do so was clogged by the fact that he would lose his shares. Certainly he had not that untrammelled dominion over property so limited which he has over property in general.”

The court further stated (p. 692):

“Therefore, we think that when the shares were distributed at the close of the five-year period, the plaintiff got for the first time the income which had theretofore been accumulating, conditionally upon his continued service and the company’s continued purpose to complete. *Appeal of Lister*, 3 B. T. A. 475. Until then it was uncertain whether he would ever receive the shares; they had become his only provisionally.”

The decision in *Schaefer v. Bowers, supra*, was followed in the case of *Ralph H. Jackson*, 40 B. T. A. 1094 (1939) which involved a similar trust with respect to shares of stock of the Carborundum Co. created by that company as a part of a profit-sharing plan for its employees. In the *Jackson* case, the Board of Tax Appeals stated (p. 1099):

“In any event, we think that *Schaefer v. Bowers, supra*, disposes of petitioners’ contention. In that case, the employee’s ultimate receipt of the stock depended on his continuance in the employ of the company for a definite period of time. The situation here is the same, for the plan as set out in the trust instrument provides that the participating employee may make monthly contributions only up to a certain amount, and that if his employment is terminated he will receive his contributions back. In other words, before he can get the stock, he must work until the sum of the maximum payments he is permitted to make out of his wages equals the purchase price of the stock he has agreed to buy. It is this feature which, as the court held in the *Schaefer* case, differentiates peti-

tioners from ordinary purchasing investors and makes them taxable under Section 165.”

See also *Commissioner of Internal Revenue v. Texas Pipe Line Co.*, 87 F. 2d 662 (3rd Cir. 1937) and *Cravens v. Climax Engineering Co.*, 40 F. 2d 359 (8th Cir. 1930).

C. It Would be Inequitable to Permit Appellants to Recover.

In view of the presentation which we have hereinabove set forth, we believe it inconceivable that the Plan would be held to be invalid insofar as it relates to Penney Company stock or otherwise. The issue whether a resulting trust should be declared in favor of the Appellants or any other participants will therefore not be reached.

In any event there is no merit to Appellants' Specification of Error No. 7 (Br. 18). It would be inequitable to allow Appellants to recover in this proceeding:

- (1) Appellants' funds were not used to cover the cost of the stock (Point IV, A *supra*).
- (2) The loan was repaid with moneys retaining no separate identity except as assets of the Fund, and which were the property not of any participant, but of the Trustee, subject only to the terms of the Plan and Trust Agreement (R. 230, par. 25; R. 252, par. 16).
- (3) The Company sold the 200,000 shares of Penney stock to the Trustee for a sum approximately \$10,000,000 less than its then market value, from which stock substantial dividend credits were received (R. 225, par. 17; R. 229, par. 22).
- (4) The Plan constituted a contract between the Company and Appellants which was fully executed and performed as to all of its terms (R. 252, par. 15; R. 246, par. 51; R. 247, par. 53; R. 242, par. 41).
- (5) The Plan had been in continuous operation for over eleven years before any attack was made on its validity (R. 248, par. 54).

- (6) The Penney Company made its original and subsequent contributions to the Plan on the basis of acceptances signed by participants and upon the basis of the validity of the Plan (R. 248, Par. 55).
- (7) Appellants have accepted and retained large benefits distributed in accordance with the terms of the Plan, including large contributions by the Penney Company and dividends on Penney Company stock (R. 239, par. 36).

The trial court made the following Finding of Fact:

“It would be highly inequitable to permit plaintiffs Wells and Albertsen to recover in this proceeding, either on their own behalf or on behalf of the class for which they are suing” (R. 249, par. 58).

and thereupon properly concluded:

“The Court has already found that the Plan is valid, but even if by some technical construction the Plan was found to constitute a lottery or other illegal scheme, it would, under all the facts and circumstances herein, be highly inequitable to permit plaintiffs to recover either on their own behalf or on behalf of the class for which they are suing.

“Neither plaintiffs nor any member of the class whom they represent is entitled to receive any shares of the Penney Company stock held by the Trustee of the Penney Company Retirement Plan” (R. 253, pars. 19, 20).

In their Specification of Error No. 8 (Br. 18, 19) Appellants' Counsel assert that the District Court erred in failing to award them reasonable attorneys' fees, to be a lien upon the shares of stock they seek to recover for those whom they represent. Since the trial court entered judgment in favor of Appellees, this issue was never reached in that court. In any event this matter of attorneys' fees involves an issue solely between Appellants and their attorneys and does not concern Appellees (R. 323-325).

CONCLUSION.

The judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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In the
United States Court of Appeals
For the Ninth Circuit

HARVEY L. WELLS and HARRY J.
ALBERTSEN, on behalf of
themselves and others
similarly situated, *Appellants*,

vs.

J. C. PENNEY COMPANY,
a corporation, and
THE CHASE MANHATTAN BANK,
a corporation (substituted
for The Chase National Bank
of the City of New York), *Appellees*.

NO. 15,125

APPELLANTS' REPLY BRIEF

Appeal from Final Judgment of the United States District
Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, JUDGE

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In the

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HONORABLE GUS J. SOLOMON, JUDGE

I. APPELLEES HAVE FAILED TO SHOW THAT STOCK AWARDS ARE NOT CONTINGENT ON THE LIVES OF PARTICIPANTS.

Nowhere in their brief do Appellees dispute the fact that under the Penney Plan stock awards to retiring participants are increased by the deaths, discharges, and withdrawals of fellow participants. Nor do they dispute that stock purchased by the Trustee at the outset of the Plan (using the contributions, earnings and credit of the then participants) was awarded only to those who survived with the Company to age 60. By failing to dispute these facts, Appellees concede that the sole issue before the court is the legal effect of the Plan. This can be determined from the Plan itself, in which awards of stock are based on three factors: (1) a participant's own contributions, (2) contributions of all participants in the Plan at the moment, and (3) the amount of stock then remaining in the 150,000 (450,000) share block.

II. APPELLEES HAVE FAILED TO SHOW THAT THE PLAN IS NOT CONTRARY TO NEW YORK LAW AND PUBLIC POLICY.

A) Appellees Consistently Misstate the Basic Issue.

Appellees do not deal with the crucial issues raised by Appellants. Instead, they deal with their own repeated misstatements of those issues.

“Appellants center their * * * charge * * * on the * * * provision that only participants who con-

tinue in the service of the Company until they reach retirement status will receive shares of Penney Company stock.” (Br. for Appellees 4)

“Appellants place major emphasis upon the Plan requirement of continued employment to retirement age in order to receive stock.” (Br. for Appellees 34)

Of course the mere fact that service to a particular age is a condition for the award of the retirement benefits does not itself render the Penney Plan illegal. Therefore, the legality of the numerous plans cited by Appellees (Br. for Appellees 18-19) in which benefits are contingent upon certain conditions precedent (age, length of service, etc.) is not challenged by Appellants, and such authorities are quite irrelevant to the illegal features of the Penney Plan.

However, when all the stock to be awarded is purchased at the outset of the Plan by using the contributions and earnings of participants during the first two years and then is awarded only to those who subsequently reach a certain age, that is improper. And when the stock awards made to those fortunate enough to survive with the company to age 60 are swelled every time a fellow participant dies, withdraws or is discharged, that too violates New York law and public policy. Such increases in the stock award to survivors is the *necessary* result from every death, discharge, and withdrawal of a participant, not, as Appellees assert, an “incidental possibility.” (Br. for Appellees 40)

B) A Participant's Service Record is Only One of Three Factors Determining His Stock Award.

Appellees suggest that Plan benefits to each participant are directly related solely to his services.

“Each participant’s benefits upon retirement or other separation under the Plan are determined by the ratio of his personal contributions to the personal contributions of all other participants then in the Plan, and are, therefore, directly related to services rendered by each during the period of his participation.” (Br. for Appellees 34)

Obviously, to the extent that each retiring participant’s contribution is the first factor used to determine stock awards, such awards are “directly related to the services rendered by each.” However, this overlooks entirely the effect on the second factor (the total contributions of all participants in the Plan at the moment) of the deaths, discharges, and withdrawals of participants *the same age or younger*, and it ignores completely the slower rate of depletion of the third factor (the block of stock) resulting from the deaths, discharges, and withdrawals of *older* participants. The effect of such deaths, discharges, and withdrawals has already been described in detail (Appellant’s Br. 22).

Thus, of the three factors determining stock benefits, only the first (the retiring participant’s own contribu-

tions) is “related to services,” while the other two factors contain the influences which are illegal precisely because they have no relation whatsoever to the services of the retiring participant.

C) Appellees Do Not Dispute that the Plan Has the Illegal Features of a Tontine.

In establishing the illegality of the Penney stock scheme, Appellants discussed five leading cases in which analogous schemes with tontine features have been held invalid (Appellants’ Br. 34-46). To these five significant cases, Appellees devote a scant two and one half pages (Br. for Appellees 24-26).

***Walker v. Walbridge* (1934) 151 Misc 329, 271 NYS 473**

This is the case in which the New York court, faced with a plan analogous to the Penney Plan, passed “on the legality of the insurance, the contract, and the note.” (271 NYS at page 480). Appellees conclude that this case “merely involved an attempt to make proceeds of a life insurance policy distributable in part to persons having no insurable interest in the insured.” (Br. for Appellees 25.) The Penney Plan not only attempts, but does, the very same thing; namely, those fortunate enough to survive to 60 take stock which in part results from the predecease, discharge, and withdrawal of other participants in whom they have no insurable interest.

Appellants also discussed thoroughly four other analogous cases: *Colgrove v. Lowe*, *Knott v. State*, *Fuller v. Metropolitan Life Ins. Co.*, *United States Life Ins. Co. v. Spinks* (Appellants' Br. 37, 39, 41, and 43) concerning which Appellees state merely that these cases are "not in point" (Br. for Appellees 25), but they do not explain why.

United State Life Ins. Co. v. Spinks (1906) 29 Ky L 960, 96 SW 889, petition for rehearing overruled (1907) 126 Ky 405, 103 SW 335, appeal dismissed (1908) 209 US 539, 52 L Ed 917 (Appellants' Br. 43)

In this case the court had to decide whether under New York Law the defendant company was required, as to Mr. Spinks, to apply not only his "reserve" but also his equitable share of four years of tontine accumulations toward the purchase of paid up insurance. Because said funds could not legally be awarded to surviving policy holders, the court held that they "should in equity go to those who had contributed [them]." (96 SW at page 894).

Appellants contend that this case was held to have "no persuasive force" in a subsequent New York case.

Fenster v. New York Life Ins. Co. (1946) 188 Misc 909, 910-911, 66 NYS (2d) 871 (Brief for Appellees 26)

This case was concerned with whether New York Insurance Law, Section 216, required dividend addi-

tions for the year ended March 7, 1944, to be applied toward extending insurance on plaintiff's deceased husband subsequent to the lapse of the policy on September 7, 1943.

The court held that "ascertainment of the divisible surplus and the apportionment of dividends for the policy year ending in 1944 was not required to be had until after December 31, 1943. Insurance Law, § 216" (66 NYS at p. 872). In the *Spinks* case, however, plaintiffs were seeking to apply accumulations which had accrued for four years, defendant company therein arguing that it need not make any distribution until the end of the ten year tontine period. Distribution of a four year accumulation in the *Spinks* case was of "no persuasive force" to require crediting of a dividend in the *Fenster* case before the end of the year in which earned.

The *Walker v. Walbridge* case, supra p. 4, was decided in 1934 in light of present day public policy. In invalidating the tontine, the court made specific reference to Penal Code, Section 992, on illegal wagering contracts (271 NYS at page 482). Appellees, however, tread lightly over that case, seeking comfort instead from listing eight pre-1907 cases in which tontine policies were involved (Br. for Appellees 21). However, in seven of these eight cases, the question of the legality of tontine policies was neither raised by counsel nor considered by the court.

Simons v. New York Life Ins. Co. (*NY Sup Ct, 1885*) 38
Hun 309 (*Br. for Appellees* 21)

This was the eighth case cited by Appellees. In it, the plaintiff, in 1875, took out a ten year tontine policy on her husband. In 1880 she ceased paying premiums and in 1882, while her husband was living, brought an action *affirming* the contract, alleging a breach thereof, and asking damages for false representations. Incidental to her argument, plaintiff, who neither had sought nor did seek at trial invalidation of the contract, contended it was an illegal wager between herself and the insurance company on the life of her husband. The court, however, refused to decide the wagering issue:

“Her action is not based on the law against gaming, and she is in *pari delicto* even if the contract was immoral and void.” (p. 316)

When this case was decided in 1885, such defense was available.

Meech v. Stoner (1859) 19 NY 26

However, as Appellants have already shown (Appellants’ Br. 62-63), later cases specifically rejected this defense of in *pari delicto* and treated the statutes for the recovery of wagered property as remedial. Indeed, when setting forth sections in the Penal Code and urging that as criminal statutes they be strictly construed

(Br. for Appellees 26-29) Appellees notably omit any mention of Sections 994 and 1383 (Appellents' Br. 61-62) which specifically encourage recovery by contributors to an illegal scheme.

D) Appellees' Brief Deals Almost Exclusively with Lottery Cases While Ignoring the Broader Wagering Proscriptions.

Appellees urge that the "chance," casualties and unknown or contingent events which affect stock awards in the Penney scheme do not fall under statutory proscriptions. Their arguments are directed almost exclusively to lottery cases, while ignoring the broader, more generic wagering prohibitions. Even if Appellee could succeed in showing the lottery statutes inapplicable, this would affect neither the applicability of the cases condemning tontines, nor the applicability of the broader wagering prohibitions. This is clearly demonstrated by one of the cases cited by Appellees.

***In re Dwyer* (Sup Ct, 1894) 14 Misc 204, 35 NYS 884, (Br. for Appellees 39-40)**

Appellees cite this case to show that the lottery laws were held inapplicable to the award of prizes to horse race winners. They neglect to point out, however, that the court observed that the gaming statute (now New York Penal Law, Sections 991 et seq.) "indisputably covers the facts of this case" (35 NYS at page 886).

E) Even Then, Appellees Fail to Show the Lottery Laws Inapplicable.

In attempting to evade the applicability of the wagering and lottery prohibitions, Appellees argue as to the “chance” in the Penney scheme: first, that it is mixed with “skill,” and, second, that it is “natural” and not “artificial.”

1. There is no “skill” involved in surviving fellow participants.

The chance which operates in the Penney scheme is that of the deaths, discharges, withdrawals and other casualties of participants. Just what “skill” is involved in surviving one’s fellow participants has not been made clear by Appellees. Nor is it made clear by any of the three cases cited by Appellees for such proposition.

People v. Fallon (1897) 152 NY 12, 46 NE 296 (Br. for Appellees 33)

In this case a horse race in which skill determined the awarding of a prize put up by others was held not a lottery or wager, as opposed to “where the stake is contributed by the participants * * * [which] is a race for a mere bet or wager * * *.” (46 N.E. at page 297)

People v. Lavin (1904) 179 NY 164, 71 NE 753 (Br. for Appellees 33)

In this case a scheme, in which prizes were won by guessing the number of cigars on which taxes would be

collected during a particular month, was held not to involve "skill."

People v. Hines (1940) 284 NY 93, 29 NE (2d) 483
(Br. for Appellees 33)

In this case, cited by Appellees in their "skill" argument, a "policy" scheme was held to violate the lottery statutes and justify punishment thereunder even though a particular statute independently proscribed such "policy" schemes. The absence of skill was mentioned by the court in holding the scheme a lottery.

Regardless of whether the existence of skill serves to mitigate against the "chance" in certain sports or intellectual games, there is clearly no "skill" related to the chances for increased stock awards in the Penney scheme. Appellees try to give the impression that wagering and lottery prohibitory laws are applied only to sordid or illegitimate schemes. Their application to insurance as well as to other legitimate forms of business promotion has already been demonstrated (Appellants' Br. 49-53; 56-59).

2. Wagers on "natural" lives are as illegal as wagers dependent on "artificial" forces.

Appellees then argue that the chance for increased stock awards from the deaths, discharges, and withdrawals of fellow participants is "merely a normal business risk in connection with a legitimate enter-

prise” (Br. for Appellees 48), due to “natural” rather than “artificial” causes, and therefore not condemned by New York law and public policy. Two cases are cited in support of this proposition, neither of which is even persuasive, much less decisive, as to the Penney scheme.

United States v. MacDonald (CCA 7, 1894) 63 Fed 426, cert denied 159 US 260, 40 L Ed 143 (Br. for Appellees 36-37)

In this case a bond scheme in which maturation benefits were determined by chance was held invalid. In dicta, the court referred to business investments on which the return was dependent on “natural law,” such as growth in the value of real estate. It also referred to life insurance as a legitimate investment because it similarly depended upon the “natural law” of a man’s life. Appellees quote extensively from this dictum (Br. for Appellees 36-37) and it is palpably wrong—insurance on another’s life is justified as an exception to wagering prohibitions only in cases where an insurable interest exists, as has been clearly demonstrated by the New York law and cases (including *Walker v. Walbridge*, already discussed) (Appellants’ Br. 32-46).

United States v. Rich (ED Ill, 1950) 90 F Supp 624, (Br. for Appellees 38-39)

In this case indictments under the federal statute prohibiting use of the mails for lottery purposes were

dismissed. Defendants were bookies for horse racing. In reaching its conclusion, the court stated that “ ‘the use of the mails has not been denied to every form of gambling’ * * * [60 F 2d 186]” (90 F Supp, at p 630), and that the statute involved did not apply to “a wager on the uncertain outcome of games of skill, or of a horse race, or of an election, wherein natural forces are determinative” (90 F Supp, at pp 628-629).

The inapplicability of this case is patent from the *New York Constitution, Article 1, Section 9*, which indicates that “except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government” wagering on horse races is prohibited in New York. The “artificial” versus “natural” chance argument is an unsound one at best and in any event inapplicable to New York law.

F) Qualification of the Plan for Tax Benefits Does Not Render It Legal.

As one last attempt to insulate the Penney scheme from condemnation under the laws and public policy of New York, Appellees contend that “the approval of the Plan by the Treasury Department is highly persuasive of its validity” (Br. for Appellees 11). The fact that J. C. Penney Company took advantage of the federal tax laws applicable to a qualified plan may involve

certain admissions against interest on the part of the Company, but the approval by the Commissioner is “entirely irrelevant” to the validity of the Plan under state law.

Moore v. Keystone Macaroni Mfg. Co. (1952) 370 Pa 172, 87 A 2d 295, 298

“Appellants raised two additional points which are worthy of consideration. The lower court excluded the defendant’s offer of Regulation 111 of the United States Treasury Department, section 29.23(a)-9, which relates to and authorizes a corporation to deduct as a business expense the amount of the salary of an officer which is paid after his death to his widow. We have heretofore in this opinion taken judicial notice of this regulation, although we sustain the action of the court below in rejecting the offer of proof. The fact, if, as we assume, it is a fact, that this was one of the factors which influenced the judgment or discretion of the directors, supports their good faith, but does not give legality to their act. *The fact that a federal tax law may permit a deduction for tax purposes is entirely irrelevant to the question of whether a corporation has the right and the power under the law of Pennsylvania to give away its corporate assets.* Since the good faith of the directors was not questioned, the court’s rejection of the testimony as irrelevant was entirely proper.” (Emphasis added)

Indeed, the Delaware law governing corporate powers (applicable to J. C. Penney Company, a Delaware corporation, R 92) similarly is not related to approval or disapproval by the Treasury Department.

***Frankel v. Donovan, et al* (Del, 1956) 120 A 2d 311, 313**

In this case a stock option plan “complie(d) with Section 218 of the Revenue Act of 1950 [26 USCA (IRC 1939) § 130A].” Nevertheless, the court held the plan invalid under state law upon attack by minority stockholders.

Kerbs v. California Eastern Airways, Inc. (Del, 1952) 90 A 2d 652; reargument den. (1952) 91 A 2d 62

Even if Treasury Department treatment for tax purposes were “highly persuasive,” Appellees cite no case dealing with the charges of illegality raised by Appellants in the case at bar.

G) *Appellees Erroneously Suggest the Stock Belongs to the Company and Not the Participants.*

Appellees do not say so directly, but they imply that the stock really belongs to the Company. Thus, say Appellees, even if the Plan is illegal it should not be held in a resulting trust for participants as “the entire cost of the stock is being paid for by the company” (Br. for Appellees 64). Appellees ignore the express provisions of the Plan, paragraph 16 (R 34) and the Trust, paragraph Fifteenth (R 70) that no part of the funds of the Trust “shall ever revert to the company.” These provisions were required to be inserted in order that the Plan qualify under IRC Section 165 (a) (2), thus

enabling the company to deduct its annual contributions as reasonable business expenses *each year*, under the provisions of IRC Sections 23 (a) and 23 (p) (1). (R 270-271)

The purpose of a “qualified” plan is to enable the employer to deduct contributions the year made while not requiring the employee to pay income tax on such benefits until actually received, *whether or not such benefits are vested and nonforfeitable*. New York tax law permits the same result for state tax purposes.

N Y Tax Law, Section 365

N Y State Tax Commission, Reg, Art 119-a and 117

Appellees imply, by citing Rev. Rul. 33, CB 1953-1, 267, 280 (Br. for Appellees 67), that the company contributions to the Plan were not “vested” in employees prior to their reaching retirement age. This is not the case. The “Company” contributions of *profits* to the present Plan, specified by Article 6 (b) (R 22), were “nonforfeitable” because all participants received their proportionate share regardless of the circumstances of leaving the Plan (R 28, 30). Similarly, after September, 1941, dividends on the Penney shares were “nonforfeitable” because all participants received their proportionate share of said dividends regardless of the circumstances of leaving the Plan (R 24, 28, 30).

Schaefer v. Bowers (CCA 2, 1931) 50 F 2d 689 (Br. for Appellees 67)

Appellees cite this case to imply that no rights accrue to participants until benefits are actually paid out. The only issue in this case, however, was whether the shares of stock received by a participant at the end of a five-year stock-purchase plan (operating only from 1920-1925) were taxable as income at their value upon receipt or upon the amount of the employer's contributions used as part of the purchase price. The court held merely that, for income-tax purposes, the value upon receipt was proper.

It is interesting to call to the court's attention its own tax treatment of the Penney Company's sale of "expansion stock" to employees. Such sales of expansion stock made to managerial employees in eight of the thirteen years from 1925 through 1937 (R 97) were expressly replaced by the stock-award provisions of the present Plan (Exhibits 2, 55 and 222 (B)).

Hawke v. Commissioner of Internal Revenue (CCA 9, 1940) 109 F 2d 946

In this case the Commissioner and the Board of Tax Appeals had refused to permit a purchaser of Penney expansion stock to use the fair market value of such stock when received as its tax basis for purposes of subse-

quent sale. This court reversed, on the grounds that any excess of fair market value over purchase price was income to the purchaser at that time despite the fact that Hawke and “the J. C. Penney Company [erroneously] did not regard the differential as taxable income to the taxpayer” (109 F 2d 950). This court stressed the compensatory nature of such stock plans:

“‘If it [the resolution authorizing the payment] was not made in recognition of services rendered, it was a misapplication of corporate funds, for obviously the corporation had no interest in giving away the corporate assets. * * * Here there was consideration — indeed, a double consideration, viz., an acknowledgment and reward for services rendered in the preceding year, and a stimulus to continued effort and service in the ensuing year. Upon no other theory could the payments be justified, and it is not necessary nor proper to explore into an unknown field to find some other motive.’

* * *

“It seems to us that there could be no clearer example of a plan to reward employees for outstanding service, and we hold that the differential as to this stock constituted additional compensation.” (109 F 2d at p 951).

Similarly, in the present Penney Plan, the company contributions, deducted each year by the Company as compensation under IRC Sections 23 (a) and 23 (p) (1), were earned by the participants at the end of each year in which they accrued. Under the theories of resulting

trust set forth by Appellants (Appellants Br. 60-79), the Trustee holds the shares of stock in a resulting trust for the 1940-1941 participants whose contributions and earnings were used for the purchase thereof.

CONCLUSION

As a general defense of the Plan, the Brief for Appellees is replete with the shibboleth that everything in respect to the Plan and the Trust was done "in strict accordance with the provisions thereof" (Br. for Appellees 54, 56, 62, 63, 64, 66, 70, 5). This attempt to seek immunity and legality by compliance with the provisions of the Plan has little meaning when it is those very provisions which Appellants attack as invalid. Strict adherence to a plan invalid on its face certainly does not redeem it.

In their entire brief, Appellees never challenge the basic demonstration by Appellants that the Penney Plan results in awards of stock (purchased with the contributions and earnings of participants) to surviving participants in amounts increased by reason of the deaths, discharges and withdrawals of fellow participants. The main defense to the impropriety of such method of stock award is the pervading implication that the J. C. Penney Company is a legitimate business enterprise entitled to accomplish in a pension retirement

plan what others may not do in insurance policies or other business programs. Such defense puts the cart before the horse. The Plan is not invalid by virtue of the business enterprise which operates it, nor because of the reasons for which it was established. It is illegal because of the manner in which it operates.

The judgment of the trial court should be reversed, and the Plan, insofar as it relates to the Penney stock, declared invalid under New York law and public policy, and the Trust as to said shares declared void and of no effect. The cause should be remanded to the District Court to supervise the administration of the resulting trust in said shares of stock for distribution to Appellants and other participants, former and present, in proportion as their contributions and earnings were used for the purchase of such stock, and to award Appellants compensation for the reasonable value of the services of their attorneys in the prosecution of this action, and for their costs and disbursements incurred herein.

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No. 15140

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERTHA TATUM,

Appellant,

vs.

OSCAR TATUM, VAI GENE TATUM, and RUBY FAY JOHNSON,

Appellees.

APPELLANT'S OPENING BRIEF.

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FILE

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No. 15140

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERTHA TATUM,

Appellant,

vs.

OSCAR TATUM, VAL GENE TATUM, and RUBY FAY JOHNSON,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment entered in favor of Appellees on February 4, 1956, by the United States District Court for the Southern District of California, Central Division [Tr. p. 65]. Notice of Appeal was filed on March 16, 1956 [Tr. p. 68].

The instant action arose under the Federal Employees Group Life Insurance Act of 1954, 5 U. S. C., Sections 2091-2103.

The action was originally brought against the United States of America and Metropolitan Life Insurance Company, a corporation. Appellant, at the time of commencement of this action, was a citizen of California and Metropolitan Life Insurance Company was a corporation authorized and existing under and by virtue of the laws of the State of New York [Tr. pp. 1, 10].

Metropolitan Life Insurance Company filed its answer and counterclaim for interpleader on July 11, 1955, naming Appellees as defendants in said counterclaim [Tr. pp. 10-23]. On September 9, 1955, the Trial Court entered an order dismissing the United States from said action [Tr. p. 42].

5 U. S. C., Section 2103, provides that the District Court has original jurisdiction concurrent with the Court of Claims of any civil action against the United States founded upon the Federal Employees Group Life Insurance Act.

An appeal from a final judgment of the District Court to the Court of Appeals is authorized by the provisions of 28 U. S. C., Section 1291.

Nature of the Action.

On August 29, 1954, Metropolitan Life Insurance Company issued group policy No. 17000-G to the United States Civil Service Commission, providing life insurance benefits for certain federal employees including Erwin Tatum, who was then employed by the United States Post Office. Erwin was insured in the amount of \$4,000.00 upon his life, and in the additional amount of \$4,000.00 in the event of accidental death.

Erwin died by accidental means on December 7, 1954. Thereafter, Metropolitan Life Insurance Company deposited the sum of \$8,000.00 in the registry of said District Court pending determination of the instant action.

The group insurance policy provided that:

“Any amount of group life insurance and group accidental death insurance in force on any employee at the date of his death shall be paid, upon the estab-

lishment of a valid claim therefor, to the person or persons surviving at the date of his death, in the following order of precedence:

“First, to the beneficiary or beneficiaries as the employee may have designated by a writing received by the employing office prior to death.

“Second, if there be no such beneficiary, to the widow or widower of such employee.

“Third, if none of the above, to the child or children of such employee and decedents of deceased children by representation.”

See: 5 U. S. C., Sec. 2093.

Erwin failed to designate a beneficiary. Appellant claims the proceeds of said insurance policy as Erwin's widow. Appellees claim said proceeds as Erwin's surviving children.

Statement of the Case.

A. The Ceremonial Marriage Between Erwin and Appellant.

On May 19, 1943, Erwin and Appellant secured a marriage license in Yavapai County, Arizona, and entered into a ceremonial marriage at Prescott, Arizona, before the Rev. Homer Green, the regular minister of the Church of God in Prescott. Rev. Green, who was at that time recognized in the community as a regularly ordained minister, signed the marriage certificate and had authority under Arizona law to perform said marriage ceremony [Pltf. Ex. 1; Plaintiff's Request for Admissions; Tr. pp. 43, 128, 163].

Before entering into said marriage, Erwin told Appellant that he was divorced from his first wife [Tr. p. 79]. Appellant believed him [Tr. p. 203].

B. Relationship Between Erwin and Appellant.

Erwin was in the United States Army between November 12, 1941 and September 4, 1945 [Pltf. Ex. 3; Tr. p. 161].

On November 12, 1941, Erwin filed a Report of Induction of Selective Serviceman, in which he stated that he was divorced. After the ceremonial marriage with Appellant, Erwin signed new Army beneficiary forms, enlisted man forms, and National Service Life Insurance forms, in which he stated that Appellant was his wife [Pltf. Ex. 3; Tr. pp. 160-161].

During this period, Appellant applied for a military allotment which was refused because Appellant failed to produce Erwin's divorce decree with reference to his earlier marriage [Tr. p. 204].

In his Army discharge papers, Erwin gave his address as that of Appellant and returned there directly after separation from military service [Pltf. Ex. 3; Tr. pp. 160-161, 164].

Thereafter, Erwin and Appellant cohabited together and held themselves out to the community as husband and wife [Pltf. Ex. 15; Tr. pp. 184-185, 213].

Among other things, they filed joint income tax returns, [Pltf. Ex. 7; Tr. pp. 171-172]; Appellant signed a promissory note as Erwin's wife [Pltf. Ex. 8; Tr. p. 172]; they received rent receipts made out to Mr. and Mrs. Tatum [Pltf. Ex. 9; Tr. pp. 172-173]; they took out fire insurance in both of their names [Pltf. Ex. 10; Tr. pp. 173-174]; they mailed Christmas cards on which their signatures were printed as Erwin and Bertha Tatum [Pltf. Ex. 11; Tr. pp. 174-175]; Erwin addressed letters to Appellant as "My Dear Wife" [Pltf. Ex. 5; Tr. p. 169];

Erwin and Appellant received mail addressed to them as Mr. and Mrs. Erwin Tatum [Pltf. Ex. 6; Tr. pp. 170-171]; Erwin named Appellant as his wife and beneficiary in an insurance policy taken out with Golden State Mutual Life Insurance Company [Pltf. Ex. 14; Tr. p. 184]; and Appellant named Erwin as her husband and beneficiary in an insurance policy taken out with Prudential Life Insurance Company [Tr. p. 169].

Appellee Oscar Tatum admitted that Erwin and Appellant behaved in his presence as husband and wife and that he believed that they were married [Tr. p. 153].

Counsel for Appellees admitted in open court that Erwin and Appellant lived together in Los Angeles as husband and wife [Tr. p. 176].

Motion picture actor, Eugene Kelly, who had employed Erwin and Appellant between 1946 and 1950, testified by way of deposition, that an employment agency informed him in 1946 that they were married. During the period of their employment nothing occurred which made Mr. Kelly believe that they were not married. In Mr. Kelly's presence, they were introduced as husband and wife and they introduced each other in the same manner. Their community reputation was that of husband and wife. They lived in one room in the Kelly residence. Appellant washed and ironed Erwin's clothes, took care of Erwin when he was sick, cooked for Erwin and did all that a wife would do for her husband [Pltf. Ex. 15; Tr. p. 213]. This testimony was confirmed by Miss Patricia McClellan, Mr. Kelly's secretary [Tr. p. 213].

Erwin's death certificate stated that Appellant was Erwin's widow [Pltf. Ex. 2; Tr. p. 129].

C. Mattie Tatum.

Mattie Tatum testified that she married Erwin in Texas on January 4, 1927, and lived with him until August, 1935 [Tr. pp. 133, 147]. Thereafter she saw or heard from Erwin at least once a year [Tr. pp. 147-148]. Appellees are the children of Erwin and Mattie.

In 1938, Mattie filed for divorce against Erwin in Smith County, Texas. However, Mattie testified that she did not obtain a divorce decree at that time [Tr. p. 149].

Although Mattie did not live with Erwin after 1935, she collected his military allotment [Tr. pp. 149-150].

In 1948, one of Erwin's daughters died in Texas. Erwin went to the funeral where he again saw Mattie. Thereafter Erwin and Mattie returned to California where they lived together from May until September 1948 [Tr. pp. 138-139].

Mattie testified that she was never served with any divorce papers before October 1948 [Tr. p. 144].

On September 3, 1948, Mattie commenced an action for divorce against Erwin in the Superior Court of the State of California, in and for the County of Los Angeles. On October 23, 1949, an interlocutory judgment of divorce was granted to Mattie by default. The final judgment of divorce was entered on November 30, 1949.

In connection with said action, Erwin and Mattie executed a property settlement agreement which stated in part as follows:

“This agreement made this 7th day of October, 1948, at and in the City of Los Angeles, County of Los Angeles, State of California, by and between Mattie W. Tatum, also known as Minnie W. Tatum,

hereinafter referred to as the wife, and Erwin Tatum, hereinafter referred to as the husband:

“Witnesseth:

“That whereas the husband and wife are now separated and living separate and apart and there is now pending a suit for divorce in the Superior Court of the County of Los Angeles, State of California, being case number D-367319, and entitled Minnie W. Tatum versus Erwin Tatum; and whereas the parties herein are desirous, for all time, to settle any and all questions of property rights that now exist and to provide for the support of their minor child, Val Gene Tatum”

Said property settlement agreement was not incorporated in the interlocutory decree of divorce [Deft. Ex. A; Tr. pp. 132-133].

D. Relationship of Erwin and Mattie.

No evidence was offered establishing whether Mattie and Erwin had the capacity to intermarry on January 4, 1927, or whether the person who purported to marry them had authority to perform the ceremony. There is no evidence in the record that Erwin did not obtain a divorce from Mattie after their separation in 1935 and before his ceremonial marriage to Appellant on May 19, 1953.

E. Relationship of Erwin and Appellant in Texas.

Erwin and Appellant resided in Fort Worth, Texas, for three to four weeks in each of the years between 1949 and 1954 after Mattie's divorce became final [Pltf. Ex. 15; Tr. pp. 165, 213].

Counsel for Appellees admitted in open court that there was no dispute that Erwin and Appellant went on trips together to Texas [Tr. p. 177].

Erwin sought employment in the Post Office at Fort Worth during some of these years and Erwin and Appellant intended to domicile in Texas. J. C. Johnson, Post Office Superintendent, testified that Erwin told him of Erwin's intention to obtain such employment in Texas [Tr. pp. 164-166, 210].

During their stay in Texas, Erwin and Appellant lived together, registered in motels under the name of Mr. and Mrs. Erwin Tatum, introduced each other as husband and wife [Tr. pp. 167-169], and received mail addressed to them as Mr. and Mrs. Erwin Tatum [Pltf. Ex. 6; Tr. p. 171].

While in Texas, Erwin and Appellant discussed their relationship in light of Mattie's 1949 divorce. Appellant told Erwin that it was time for them to "fix this over." Erwin answered that there was no need because he was already married to Appellant in Texas and that he was her husband. Appellant agreed [Tr. pp. 166-167, 200-201]. The parties believed they were married after Mattie's divorce became final [Tr. pp. 8, 205-206].

Erwin held Appellant out as his wife in both California and Texas. Appellant believed Erwin when he told her that they were husband and wife under Texas law [Tr. pp. 184-185, 209].

Issues Presented.

The issue presented by this appeal is whether Appellant is entitled to the proceeds of a federal employees group life insurance policy on the life of Erwin Tatum, deceased, by virtue of being his widow under a ceremonial, common law or putative marriage.

The legal issues are as follows:

1. Ceremonial Marriage.

Where a ceremonial marriage would be valid except for the alleged incapacity of one of the parties to enter into such contract because of an alleged preexisting marriage:

(a) Is said subsequent marriage valid as a matter of law in the absence of evidence that the parties to the alleged preexisting marriage did not secure a divorce or annulment thereof, and

(b) Is said subsequent marriage valid as a matter of law in the absence of evidence that the parties to the alleged preexisting marriage had the capacity to enter into said preexisting marriage?

(c) Does a divorce in the preexisting marriage, obtained after the subsequent marriage, establish that the parties to the alleged preexisting marriage merely are no longer husband and wife and not that they were validly married at the time of said divorce?

2. Common Law Marriage.

Do California domiciliaries who celebrated a ceremonial marriage, invalid because of an impediment of a preexisting marriage of one of the parties, contract a valid Texas common law marriage recognizable in California after removal of the impediment where there is cohabitation and holding out as husband and wife in Texas?

3. Putative Marriage.

Is a woman who contracts a ceremonial marriage in good faith and in ignorance of any impediment to the validity thereof entitled to the proceeds of a federal employees group life insurance policy as the putative spouse of the insured?

ARGUMENT.

I.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, Because She Is the Widow of Said Insured by Virtue of the Ceremonial Marriage Entered Into on May 19, 1943.

A. The Ceremonial Marriage Between Erwin and Appellant.

On May 19, 1943, Erwin and Appellant secured a marriage license in Yavapai County, Arizona, a certified and authenticated copy thereof was received in evidence as Plaintiff's Exhibit 1 [Tr. p. 128]. Thereafter, the parties entered into a ceremonial marriage at Prescott, Arizona, before the Rev. Homer Green, a regular minister of the Church of God in Prescott. Rev. Green had authority under Arizona law to perform the marriage [Request for Admissions under Rule 36; Tr. p. 43].

Thus, under Arizona law, the marriage between Erwin and Appellant was valid.

5 Ariz. Code, Secs. 63-101, 103, 111.

The validity of the marriage was established by the certified and authenticated copy of the marriage certificate combined with Appellees' Admissions regarding the signature of Rev. Green and his authority to perform the ceremony.

People v. Ledoux, 1909, 155 Cal. 535, 550, 102 Pac. 517;

People v. Jordan, 1925, 72 Cal. App. 406, 408, 237 Pac. 757;

Cal. Code Civ. Proc., Sec. 1948.

B. Presumption of Validity of Ceremonial Marriage Between Erwin and Appellant.

Mattie testified that she married Erwin in Texas on January 4, 1927.

However, the presumption is that Erwin's subsequent ceremonial marriage to Appellant was valid and that any prior marriage to Mattie was dissolved by death or divorce. The burden was upon Appellees to rebut this presumption.

Briggs v. United States, 90 Fed. Supp. 135 (Ct. Cl. 1950);

Birch v. Birch, 1955, 136 Cal. App. 2d 615, 289 P. 2d 53;

Hamrick v. Hamrick, 1953, 119 Cal. App. 2d 839, 260 P. 2d 188;

Gainey v. Gainey, 1953, 119 Cal. App. 2d 564, 259 P. 2d 984;

Sanders v. Sanders, 1938, 52 Ariz. 156, 79 P. 2d 523;

Kolombatovich v. Magna Copper Co., 1934, 43 Ariz. 314, 318, 30 P. 2d 832;

McCord v. McCord, 1911, 13 Ariz. 377, 114 Pac. 968.

In *Estate of Smith*, 1949, 33 Cal. 2d 279, 281, 201 P. 2d 539, the California Supreme Court held as follows:

"It is well established that when a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage."

In *Kalombatovich v. Magna Copper Co.*, *supra*, the Arizona Supreme Court stated on page 318 as follows:

“Where one contracts a second marriage during the lifetime of the first spouse, the presumption that the first marriage was legally dissolved prevails and the one who asserts that the second marriage is invalid has the burden of showing that there has been no divorce.”

A marriage valid where contracted is valid everywhere. The law of the place of contracting governs validity of marriage.

Estate of Perez, 1950, 98 Cal. App. 2d 121, 219 P. 2d 35;

Cal. Civ. Code, Sec. 63.

Under both California and Arizona law, the ceremonial marriage between Erwin and Appellant is presumed to be valid.

C. Burden of Proof Necessary to Rebut Presumption of Validity of Subsequent Marriage.

The law of the forum governs evidentiary rules, burden of proof, and presumptions and inferences to be drawn from the evidence. Thus, California evidentiary rules are applicable.

Hamlet v. Hook, 1951, 106 Cal. App. 2d 791, 236 P. 2d 196;

Restatement of Conflict of Laws, Sec. 595;

11 *Cal. Jur.* 2d 201.

If either Erwin or Appellant lacked the capacity to enter into the 1943 ceremonial marriage because of a preexisting valid marriage, then such party would be guilty of the crime of bigamy.

However, the presumption that a person is innocent of crime is one of the strongest known to law.

Cal. Code Civ. Proc., Sec. 1963;

People v. Shorts, 1948, 32 Cal. 2d 502, 507, 197 P. 2d 330;

Hunter v. Hunter, 1896, 111 Cal. 261, 267, 43 Pac. 756.

Accordingly, the California Supreme Court stated in *Hunter v. Hunter*, *supra*, on page 267, as follows:

“It is presumed that a person is innocent of crime and wrong. (Code Civ. Proc., sec. 1963). There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce.”

Although this is the accepted doctrine, the Trial Court announced a contrary rule throughout the trial maintaining that once an earlier marriage was established, the burden shifted to Appellant to prove the validity of her subsequent marriage to Erwin. The Trial Court stated:

“I think if you establish a prior marriage then the burden shifts. A marriage once consummated is presumed to continue until there is some evidence of termination.” [Tr. p. 142], and

“The Court: But as a *prima facie* case he is resting his case upon a ceremonial marriage in Arizona. You have already introduced evidence that there was a prior marriage.

Mr. Ross: That is correct, your Honor.

The Court: He can't be married to two people at the same time.

Mr. Ross: No, but I understand there is this presumption of innocence which I have to overcome.

The Court: This is not a criminal trial." [Tr. p. 143].

The Trial Court obviously ignored the general rule that the subsequent marriage is presumed valid and in order to rebut the presumption of validity, the attacking party must prove no divorce or annulment of the prior marriage in any state in which the parties to the prior marriage resided.

Bancroft v. Bancroft, 1935, 9 Cal. App. 2d 464, 50 P. 2d 465;

Marsh v. Marsh, 1926, 79 Cal. App. 560, 568, 250 Pac. 411;

Estate of Smith, 1949, 33 Cal. 2d 279, 201 P. 2d 539;

Estate of Winder, 1950, 98 Cal. App. 2d 78, 86, 219 P. 2d 18;

Mazzenga v. Rosso, 1948, 87 Cal. App. 2d 790, 792, 197 P. 2d 710;

Estate of Borneman, 1939, 35 Cal. App. 2d 455, 460, 96 P. 2d 182.

There is no evidence that Erwin failed to obtain a divorce in the states where he resided between 1927 and 1943. Mattie testified that she did not procure such divorce. But the failure of Mattie to have obtained such

divorce was not sufficient to overcome the presumption of validity of the second marriage.

Estate of Borneman, 1939, 35 Cal. App. 2d 455, 460, 96 P. 2d 182;

Kalombatovich v. Magna Copper Co., 1934, 43 Ariz. 314, 320, 30 P. 2d 832;

McCord v. McCord, 1911, 13 Ariz. 377, 114 Pac. 968.

In *Bancroft v. Bancroft*, 1935, 9 Cal. App. 2d 464, 50 P. 2d 465, the Court stated at pages 469 and 470 as follows:

“ . . . it is not sufficient for the party asserting the validity of the first marriage to prove that she had not obtained a divorce and had not been served with process in a divorce action brought by her husband. In order to overcome the presumption she must not only prove those facts but must prove that her husband was not granted a divorce in any of the jurisdictions in which he resided prior to the second marriage.”

On the other hand, the evidence clearly established that Erwin obtained a divorce prior to his ceremonial marriage to Appellant.

See Statement of the Case, B. Relationship of the Parties, *supra*.

Accordingly, as a matter of law, the Court must presume that the marriage between Erwin and Appellant was valid. This the Trial Court failed to do and thus committed prejudicial error.

D. Validity of Marriage Between Mattie and Erwin.

In any event, the marriage between Erwin and Appellant could be void only if Mattie and Erwin themselves had the capacity to contract a valid marriage in 1927. The question thus arises as to whether there was a prior valid marriage between Mattie and Irwin. The burden of proving the validity of the alleged prior marriage was upon Appellees.

Briggs v. United States, 90 Fed. Supp. 135, 142 (Ct. Cl. 1950);

United States v. Green, 98 Fed. 63, 65 (S. D. Ia., 1899);

Fugway v. State, 1927, Ala. A. 243, 114 So. 892, 894;

Keller v. Linsenmeyer, 1927, 101 N. J. Eq. 664, 139 Atl. 33, 38;

In re Capraros Estate, 1934, 116 N. J. Eq. 259, 172 Atl. 907, 908;

Johanessen v. Johanessen, 1911, 70 Misc. 361, 128 N. Y. Supp. 892, 896;

In re Deforeas Estate, 1926, 119 Or. 556, 249 Pac. 632, 634;

Routledge v. Githens, 1926, 118 Or. 70, 245 Pac. 1072.

However, Appellees offered no evidence to establish the validity of the alleged prior marriage.

Furthermore, although a certified copy of the marriage license between Mattie and Erwin was received in evidence, there was no proof of the signature of the person

by whom it purports to have been signed and of his authority to perform the marriage ceremony.

The marriage certificate did not prove itself. Without proof of the signature of the person by whom it purports to have been signed and of his authority to perform the marriage ceremony, it did not prove a marriage between Mattie and Erwin.

People v. Le Doux, 1901, 155 Cal. 535, 550, 102 Pac. 517;

People v. Jordan, 1925, 72 Cal. App. 406, 408, 237 Pac. 757;

Cal. Code Civ. Proc., Sec. 1948.

Too much is at stake to vitiate a ceremonial marriage without a strong showing. Ceremonial marriage, the pillar of our social structure, is carefully protected by the law. Property rights, legitimation of children, and community reputation are based upon ceremonial marriage. Thus, the burden has always been upon the attacking party to establish by a great *quantum* of evidence the invalidity of the last ceremonial marriage in point of time.

Since there is no evidence in the record that the 1927 marriage between Mattie and Erwin was valid, the Court, as a matter of law, must hold the subsequent marriage to be binding. However, the Trial Court found that at the time of the marriage between Erwin and Appellant, there was a subsisting, undissolved marriage between Erwin and Mattie [Tr. p. 58]. This was clearly prejudicial error.

E. Effect of Mattie's 1949 Divorce.

The evidence was undisputed that Mattie obtained a final judgment of divorce from Erwin on November 30, 1949.

The Trial Court stated that the divorce decree established as a matter of law that Mattie and Erwin were legally husband and wife at that time, stating:

“There has been introduced here a decree of divorce and I think the only inference the court can take at this time is that when the decree of divorce was entered they were husband and wife.

“I had a case recently involving an entirely different point, but at that time I came to the conclusion that a decree of divorce between two people in the State of California I would have to recognize because a decree of divorce could not be granted unless the relationship of husband and wife existed.” [Tr. p. 144].

However, a divorce decree is not *res judicata* against third persons and does not establish the validity or existence of a prior marriage. The decree merely establishes that the parties are not thereafter husband and wife.

Rediker v. Rediker, 1950, 35 Cal. 2d 796, 221 P. 2d 1;

Watson v. Watson, 1952, 39 Cal. 2d 305, 246 P. 2d 19;

Hunter v. Hunter, 1896, 111 Cal. 261, 43 Pac. 756;

Briggs v. United States, 90 Fed. Supp. 135 (Ct. Cl. 1950).

In *Rediker v. Rediker*, *supra*, the Court stated as follows in pages 800-801:

“It is an oversimplification to state that a divorce proceeding is a proceeding *in rem*, and to proceed from that statement to the assumption that a decree entered therein is *res adjudicata* in an action between a party and a stranger thereto, not only as to the subsequent status of the parties with relation to each other, but also as to all issues decided or that might have been decided in the proceeding. The weight of authority holds that a decree of divorce is a judgment *in rem* only to the extent that it adjudicates the future status of the parties in relation to each other. (Williams vs. North Carolina, 317 U. S. 387, 298 (63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273); Williams vs. North Carolina, 325 U. S. 226, 232 (65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366) . . . As between strangers or strangers and parties, however, the decree is *res judicata* only in that it conclusively determines that the parties are thereafter free to remarry so far as any relation to each other is concerned. *It does not establish the previous validity of their marriage against third persons who were not and had no right to be heard thereon.* (2 Freeman, Judgments, Sec. 910, p. 1913; 3 Freeman, Judgments Sec. 1524, pp. 3131-3132; Restatement, Judgments, Sec. 74, p. 335; Hunter v. Hunter, 111 Cal. 261, 266 (43 P. 756, 52 Am. St. Rep. 180, 31 L. R. A. 411); Estate of James, 99 Cal. 374, 379 (33 P. 1122, 37 Am. St. Rep. 60).”

Thus, Mattie's divorce decree merely established that Mattie and Erwin were no longer husband and wife. It did not establish that they were legally married at the time of the decree or at any other time.

Accordingly, Appellees failed to rebut the presumption of validity of the 1943 ceremonial marriage between Erwin and Appellant and the court must hold, as a matter of law, that Appellant is the widow of Erwin and therefore entitled to his insurance proceeds.

II.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, as the Widow of Said Insured by Virtue of a Texas Common Law Marriage Entered Into Subsequent to the 1949 Divorce Between Mattie and Erwin.

The evidence was undisputed that Erwin and Appellant resided in Texas for periods of time between 1949 and 1954, subsequent to the time that Mattie's divorce became final [Tr. pp. 165, 177, 213]; that Erwin sought employment at the Post Office in Fort Worth, Texas, during some of said years [Tr. pp. 164-166, 210]; and that while in Texas, Erwin and Appellant cohabited and held themselves out to the public as husband and wife [Tr. pp. 167-171]. The Trial Court so found [Tr. p. 59]. In addition, Erwin and Appellant believed that they were married while they were in Texas [Tr. pp. 184-185, 209].

The Trial Court raised the question of whether a California resident visiting Texas for the purpose of securing employment could consummate a valid common law marriage which would be recognized on return to California [Tr. pp. 178-179, 204-206]. In short, the issue is whether a Texas domicile is a prerequisite to a Texas common law marriage.

Domicile or residence is *not* one of the prerequisites to a Texas common law marriage. A Texas common law marriage occurs where there is cohabitation and holding out to the community as husband and wife in Texas.

Ray v. Thompson, 1953, 261 S. W. 2d 195;

Baker v. Mays & Mays, 1947, 199 S. W. 2d 279;

Hill v. Smith, 1944, 181 S. W. 2d 1015;

28 Tex. Jur. 716.

A single act of publicly holding forth as husband and wife in Texas, followed by a like holding forth in other states, is sufficient to constitute a common law marriage.

Estate of McKanna, 1951, 106 Cal. App. 2d 126,
234 P. 2d 673;

Bobbitt v. Bobbitt, 1920, 223 S. W. 478.

It has been expressly held that neither domicile nor residence is a prerequisite to common law marriage.

Estate of McKanna, 1951, 106 Cal. App. 2d 126,
234 P. 2d 673;

Bobbitt v. Bobbitt, 1920, 223 S. W. 478;

Shea v. Shea, 1945, 294 N. Y. 909;

Hynes v. McDermott, 1883, 91 N. Y. 451.

In *Estate of McKanna*, 1951, 106 Cal. App. 2d 126, 234 P. 2d 673, a California domiciliary visited Texas on a combination business and pleasure trip. While there, he met a woman with whom he lived as husband and wife for approximately three weeks. They returned to California where they resided until the husband's death, except for occasional visits elsewhere. The issue in the *McKanna* case was identical to the issue in the instant

case, to wit: was there a valid Texas common law marriage celebrated during the short stay in Texas. The Court stated on pages 131 and 132, as follows:

“Notwithstanding what has so far been said, appellant contends that there is a further essential to the validity of a common law marriage in Texas, *i.e.*, that the parties be domiciled in the State at the time of the alleged agreement to marry, or that at the time there was an intention to acquire a domicile in the state. In view of the fact that there is no such requirement to a ceremonial marriage in Texas, and the constant reiteration by its courts that there are at most only three essentials to a common law marriage in Texas, of which essentials domicile is never referred to, we see no merit in the contention.”

It might be added, that in the instant action, the parties had the intention of domiciling in Texas. [Tr. p. 166.]

Although the Trial Court found both cohabitation and holding out as husband and wife, it also found that there was no express agreement to be husband and wife. [Tr. p. 60.]

However, as a matter of law, Erwin and Appellant became husband and wife in Texas after Mattie's final decree was entered. Under Texas law an invalid marriage contracted in good faith, and followed by cohabitation as husband and wife, after removal of the impediment, creates a valid Texas common law marriage.

Curtin v. State, 1950, 155 Tex. Cr. 625, 238 S. W. 2d 187;

Consolidated Underwriters v. Kelly, 1929, 15 S. W. 2d 229, 300 S. W. 981.

In *Curtin v. State*, *supra*, wife married husband in 1931, upon his representation that he was divorced. In

1934, wife discovered that husband had misrepresented his earlier divorce. Wife continued living with husband. Husband finally obtained a divorce from his first wife in 1938. Wife lived with husband until 1949. Wife testified and the Court found that there was never any agreement concerning the marriage. The Court held that the removal of the impediment created a common law marriage in Texas as a matter of law, stating on page 192 as follows:

“There are many different conditions that would allow a putative marriage to ripen into a legitimate union of the parties . . . The doctrine that an invalid marriage contracted in good faith, followed by cohabitation as husband and wife after the removal of the impediment to the marriage, constitutes a valid common law marriage has been applied where the impediment to the marriage was a subsisting marriage of one of the parties, and such marriage was terminated by death or divorce . . . The doctrine applies whether the initial marriage was a ceremonial or an informal, common law marriage, although a ceremonial marriage has been held to be significant as indicating that the parties intended a matrimonial, and not a meretricious relationship.”

See also:

Utterback v. Utterback, 71 Fed. Supp. 231 (D. C., 1947).

Moreover, under such circumstances, domicile is not a requirement of establishing a Texas common law marriage. In *Estate of McKanna*, 1951, 106 Cal. App. 2d 126, 234 P. 2d 673, the Court stated on page 133 as follows:

“In short, domicile is an aid but not a prerequisite to sustain the claim of the common law marriage in

Texas where the original contract of marriage was invalid.”

Accordingly, since the impediment was removed, Erwin and Appellant became common law husband and wife in Texas after 1949 as a matter of law.

Moreover, the burden was not upon Appellant to prove an express agreement to become husband and wife. An implied agreement is sufficient and is found from cohabitation and holding out to the community as such.

Estate of McKanna, 1951, 106 Cal. App. 2d 126, 234 P. 2d 673;

Consolidated Underwriters v. Kelly, 1929, 15 S. W. 2d 229, 300 S. W. 981;

Ray v. Thompson, 1953, 261 S. W. 2d 195.

In *Ray v. Thompson*, *supra*, the Court stated on page 196 as follows:

“ . . . It may be conceded that the appellees could not prove that there had been an express agreement to marry . . . no such burden was upon them, since—as it is well settled by our authorities—such an agreement may be implied from cohabitation and holding out to the community that the spouses were living together as husband and wife.”

A common law marriage is as valid as a ceremonial marriage and is recognized as such in California. The surviving wife of a common law marriage is the legal widow and is entitled to all rights of a legal widow.

Colbert v. Colbert, 1946, 28 Cal. 2d 276, 280, 169 P. 2d 633;

McDonald v. McDonald, 1936, 6 Cal. 2d 457, 58 P. 2d 163;

Cal. Civ. Code, Sec. 63.

Thus, even if the ceremonial marriage was invalid, Erwin and Appellant became common law husband and wife after Mattie's decree became final as a matter of law, and Appellant is entitled to the insurance proceeds as Erwin's common law widow. The findings of the Trial Court on this issue constituted prejudicial error.

III.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, as the Putative Spouse of Said Insured.

Regardless of whether Appellant was Erwin's lawful widow, there is no question but that at the time of the marriage ceremony of May 19, 1943, Appellant acted in good faith. Moreover, Erwin and Appellant resided together as husband and wife in California during the time that premiums were paid for said insurance.

The Trial Court concluded as a matter of law that Appellant was not entitled to the status of putative spouse [Tr. p. 61]. This was clearly contrary to the evidence.

The basic element of a putative marriage is the good faith belief in a valid marriage.

Vallera v. Vallera, 1943, 21 Cal. 2d 681, 684, 134 P. 2d 761.

The evidence clearly established that Appellant believed that she was Erwin's wife after the 1943 ceremonial marriage and after Mattie's 1949 divorce. Thus, at least she should be found to be Erwin's putative spouse.

A woman residing with a man as his wife in California in the good faith belief that a valid marriage exists, is entitled upon termination of the relationship to share in the property acquired by them during its existence.

Vallera v. Vallera, 1943, 21 Cal. 2d 681, 684, 134 P. 2d 761.

The putative spouse inherits the entire estate of a putative union upon the death of her husband intestate.

Estate of Krone, 1948, 83 Cal. App. 2d 766, 769, 189 P. 2d 741;

Union Bank & Trust Co. v. Gordon, 1953, 166 Cal. App. 2d 681, 254 P. 2d 644;

Mazzenga v. Rosso, 1948, 87 Cal. App. 2d 790, 197 P. 2d 770.

The proceeds of an insurance policy on the life of a husband are community property to the extent that the premiums were paid with community funds and belong to the surviving putative spouse.

Estate of Foy, 1952, 109 Cal. App. 2d 329, 240 P. 2d 685;

Travelers Insurance Co. v. Sancher, 1933, 219 Cal. 351, 353, 26 P. 2d 482;

Dixon Insurance Co. v. Peacock, 1933, 217 Cal. 415, 418, 19 P. 2d 233.

However, the Trial Court concluded as a matter of law that the term "widow" employed in the provision of the policy and in 5 U. S. C., Section 2093, meant lawful and not putative widow. [Tr. p. 61.]

In *Moore Drydock Company v. Pillsbury*, 169 F. 2d 988 (9th Cir., 1948), this Court interpreted the term "widow" as the equivalent of the term "surviving wife," in construction of the Longshoremen's and Harbor Workers' Compensation Act. Such definition would be equally appropriate in connection with the Federal Employees Group Life Insurance Act.

California Probate Code, Section 201, provides that upon the death of either husband or wife, intestate, the entire community property goes to the "surviving spouse."

In *Estate of Krone*, 1948, 83 Cal. App. 2d 766, 189 P. 2d 741, the question arose as to whether a putative wife was the “surviving spouse” under Probate Code, Section 201, and entitled to inherit the entire community estate upon the death of her putative husband intestate. The Court held that the surviving putative wife inherited the entire community estate upon death of her husband intestate.

It is true that the term “widow” in connection with the National Service Life Insurance Act, has been held to mean the “lawful wife” of a serviceman.

Muir v. United States, 93 Fed. Supp. 939 (N. D. Cal., 1950).

However, the rules applicable to interpretation of the National Service Life Insurance Act are not equally effective with reference to the Federal Employee’s Group Life Insurance Act.

Federal employee’s group life insurance is additional compensation given to federal employees. The United States Government pays part of the cost of the insurance. As such, the group insurance is one of the fringe benefits constituting part of the salary of federal employees.

See:

5 U. S. C., Sec. 2094(b).

If this compensation was in any form other than group life insurance, there would be no question but that such compensation would be community property and subject to the rules set forth in *Estate of Krone, supra*. There is no reason to distinguish between forms of earnings. All earnings received during marriage are community

property, in which both the legal and putative wife have an interest. The logical and equitable interpretation of the Federal Employee's Group Life Insurance Act would be to hold that the group insurance was a form of earnings paid to the federal employees. As such, the earnings are governed by applicable state law. In this case, Appellant, as putative widow of Erwin, is entitled to said earnings. Accordingly, Appellant is entitled to the proceeds of said insurance.

See:

Speedling v. Hobby, 132 Fed. Supp. 833 (N. D. Cal., 1955).

Conclusion.

After living with Erwin for thirteen years and ministering to his needs in the husband and wife relationship, Appellant at least has an equitable claim to the proceeds of said life insurance.

Fortunately, in this case, the law affords to Appellant the equitable remedy. Under the facts and law of this case, Appellant is entitled to said proceeds as the legal (ceremonial or common law) or putative widow of Erwin. The Court of Appeals should so order.

Respectfully submitted,

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Attorney for Appellant.

No. 15140

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERTHA TATUM,

Appellant,

vs.

OSCAR TATUM, VAL GENE TATUM, and RUBY FAY JOHN-
SON,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Preliminary Statement.

Respondent feels compelled at the very outset of this Brief to respectfully draw the Court's attention to the manner in which the Appellant has attempted to retry the issues of this case by resorting to arguments of the evidence and drawing its own inferences of the testimony. Respondents submit that this is not only improper but is a direct attempt to place before this Court unwarranted inferences of the Appellant instead of the actual findings of the Trial Court.

While Appellant frequently resorts to the phrase, "The evidence is undisputed", and "The evidence clearly established", nowhere has Appellant stated that the Trial Court's finding of fact are not supported by the evidence in any respect and Appellant cites no instance of error upon the part of the Trial Court in respect to admission

or rejection of offered evidence, and in this respect Appellant seems to have abandoned his Points 5, 6 and 7 of his statement of Points on appeal.

Appellant's method of argument throughout is to assume the existence of a state of facts favorable to her and to follow these up with elementary statements of law which lead to the conclusion that the Trial Court should have entered judgment in her favor. Inasmuch as Appellant's argument depends on the assumed set of facts contrary to the findings and often in flagrant variance with her own testimony. Respondents in their Brief include a detailed statement of facts with direct reference to the record in each instance.

Comment on the Record.

Appellees are somewhat at a loss to know where to start and stop in pointing out inaccuracies in the so-called "transcript of record." In addition to duplication of pages 78 through 123 on pages 162 through 209 and typographical errors too numerous to mention, some of which appear at transcript page 137, line 7, where word "Bertha" should read "Erwin"; transcript page 147, line 19, where "1953" should read "1935"; transcript page 150, line 14, where "Di" should read "Do"; same error at transcript, page 154, line 8; transcript, page 155, line 5, the words "Not the" are omitted after the word "Present"; transcript, page 165, line 21, the second apostrophe 52 should be apostrophe 53. Transcript page 132, line 24, October 29, 1949, should read October 29, 1948. At page 59, line 10 an entire line of the findings is omitted; after the word "with" and before the word "plaintiff" the following should be inserted "his wife Mattie W. Tatum and after Sept. 3, 1948 Erwin Tatum cohabited with". An important error

changing the testimony in favor of Appellant appears at transcript, page 167, line 7, where "Why do it over" should read "Why do what over". To verify the above, Appellees submit a transcript by J. D. Ambrose, Official Reporter, and his certificate that said transcript submitted herewith is a true and correct transcript of his stenographic notes [Tr. J. D. Ambrose, p. 8].

Nature of the Action.

This action was originally brought by Appellant against the Metropolitan Life Insurance Company, a defendant in the original action, for the proceeds of a policy of life insurance. In her action, Appellant claimed to be the widow of the deceased insured. Metropolitan Life Insurance Company filed its answer and counterclaim for interpleader naming Appellees as defendants in said counterclaim [Tr. pp. 10-23]. Appellees are decedent's children [Tr. p. 59]. The sole issue before the Trial Court and upon appeal is whether Appellant is said widow.

Summary of Material Facts.

A statement of the material and operative facts follows with references to Erwin Tatum, deceased, being made simply as "Erwin"; those to Bertha Tatum as "Bertha"; those to Mattie W. Tatum as "Mattie"; Oscar Tatum is referred to as "Oscar", Val Gene Tatum is referred to as "Val Gene"; and Ruby Fay Johnson is referred to as "Ruby".

On August 29, 1954, Metropolitan Life Insurance Company issued a group policy No. 17000-G providing life insurance for certain Federal employees including one Erwin Tatum. The policy provided that in the absence of a designated beneficiary, the proceeds of said policy should be paid to the employee's widow, and if there was no

widow, to the employee's children. Erwin Tatum did fail to designate a beneficiary and died December 7, 1954. Appellees are the children of Erwin Tatum and Appellant claims to be his widow [Tr. pp. 10-23].

Mattie Tatum, the mother of Respondents Oscar, Ruby Fay and Val Gene, married Erwin Tatum January 1, 1927, at Tyler, Texas [Tr. pp. 133-136; Ex. No. "C"]. Thereafter, Erwin and Mattie resided together continuously in the State of Texas as husband and wife until August, 1935, when they separated [Tr. p. 147]. Respondent Oscar was born to Mattie and Erwin May 15, 1927, at Leon County, Texas [Tr. p. 136]. Ruby Fay was born to them November 3, 1928, in Firestone County, Texas [Tr. p. 136]. Josephine Tatum, a child who has been deceased since 1948, of Mattie and Erwin, was born November 15, 1930 [Tr. p. 137]. Val Gene was born to them July 21, 1932, in Leon County, Texas [Tr. p. 137].

After the separation, both Erwin and Mattie continued to reside in Texas. Erwin provided for the children and no year went by that Mattie did not see Erwin [Tr. p. 148]. In November of 1941 Erwin was inducted into military service from Texas and served until October, 1945 [Tr. p. 140]. Mattie got an allotment as a serviceman's wife [Tr. p. 140].

On May 19, 1943, while still in military service, Erwin and Bertha, Appellant herein, went through a ceremony of marriage at Prescott, Arizona [Tr. p. 128]. Appellant applied for an allotment as wife of a serviceman and was denied same on the ground that she was not Erwin's wife [Tr. p. 204].

Appellant stated in her claim to the Metropolitan Life Insurance Company that she had previously been married to a Sam Wheeler [Tr. p. 186] and that this marriage

was terminated by death [Tr. p. 187]. Her marriage license to Erwin showed that she called herself "Bertha Wheeler" at the time of her ceremony [Tr. p. 194]. At the trial, appellant stated that she was not legally married to Wheeler but was previously married to Abe Baldwin [Tr. p. 187] and that this marriage terminated by divorce [Tr. p. 187]. "So we separated and I went home and so he went some place. I don't know where." Appellant states she never went to court but signed a paper [Tr. pp. 188-189]. Later, upon reopening of trial for taking of further testimony, appellant claimed that the marriage was terminated by death [Tr. p. 240] and after admitting several times that she did not hear about Baldwin's dying "until a couple months ago" [Tr. p. 240] was finally led in to testifying that at the time she married Erwin she believed Baldwin to be dead [Tr. p. 241].

After Erwin's discharge from the Army in 1945, he resided in Los Angeles County until the date of his death [Tr. pp. 4, 190]. Appellant states in her complaint and testified that from the date of her ceremony with Erwin until his death, she believed her ceremonial marriage was a good one [Tr. pp. 4, 191]. She states, in fact, that after that she never had any discussion with Erwin about getting married—"We just figured we were married after getting a divorce and she put him out and he came back and begged my pardon and I took him back" [Tr. pp. 205-206].

In May of 1948, Josephine Tatum died in Texas and Erwin traveled from Los Angeles to Texas for the funeral [Tr. p. 138]. At that time, without any legal proceeding, Erwin left appellant and resumed marital life with Mattie, and together with Mattie, returned to Los Angeles County where they cohabited as husband and wife until September of 1948 [Tr. pp. 138-139].

In May of 1948, appellant had the first of many conversations with Mattie about the relative marital status [Tr. pp. 140, 202]. According to Mattie's testimony, appellant stated she was going to have Erwin 'sent to the penitentiary for bigamy [Tr. p. 140]. According to appellant, Mattie was the one that told her she was going to have Erwin sent to the penitentiary for bigamy [Tr. p. 202]. In one of the conversations, appellant stated that Erwin

“was going to come over entirely and stay until he gets his divorce and then come back and *marry her*” [Tr. p. 140].

In September of 1948 Erwin and Mattie separated and Mattie commenced action for divorce in Los Angeles County Superior Court, final judgment therein being rendered November 30, 1949 [Tr. pp. 132-133]. Appellant knew about the divorce, knew when it came up in court and, at that time, knew that Erwin had a previous marriage that had not been terminated [Tr. p. 191]. In September of 1948 Erwin told Mattie that he hadn't gotten a divorce [Tr. p. 141]. On October 7, 1948, Mattie and Erwin executed a property settlement, the signatures thereon being acknowledged before a Notary Public, stating that they were husband and wife [Tr. p. 132]. No other action has ever been commenced between these parties in Los Angeles County [Tr. pp. 141-144; Ex. No. "D"]. In October, 1953, respondent Val Gene was court martialed in Texas and Erwin went there and met Mattie. At that time Erwin told Mattie he wasn't married to Bertha and never would marry her [Tr. pp. 148-149].

After the final decree of divorce between Mattie and Erwin was entered December 30, 1949, appellant testified that during 1950, 1951, 1952, 1953 and 1954, she and Erwin spent three or four weeks in Ft. Worth, Texas

[Tr. p. 165]. While in Texas she had conversations with Erwin as follows:

“Well, he said . . . when I mentioned about it I says, ‘Now is the time for us to fix this and do it over’ and he says, ‘Why do what over’ and he says, ‘I am already married to you in the State of Texas.’ He said ‘I am your husband’ and I said, ‘Well, if you take it like that it is all right with me. I will take it, too’ ” [Tr. p. 167, as corrected].

Asked what date appellant decided to get married in Texas, appellant answered:

“ ‘42 or ‘43 along in ‘43, ‘42 and ‘44 ” [Tr. p. 198].

Appellant then answered that after her ‘43 marriage she agreed to be husband and wife with Erwin and it was in ‘44 or ‘45 [Tr. p. 199]. Asked more specifically about the above conversation after calling her attention to it, appellant answered the date of the talk was ‘51, ‘52, ‘53 and ‘54, and they said the same thing each year [Tr. p. 200]. Appellant further states that she discussed a ceremonial marriage with Erwin in Texas in 1954 [Tr. p. 201], but appellant states that she didn’t tell Erwin she wouldn’t wear a ring unless she got a ceremonial marriage because “It was never discussed. I thought all the time we were married” [Tr. pp. 202-203]. Again, when questioned if there were any discussions with Erwin about marriage when he left Mattie and came back to live with her, appellant stated:

“No discussion about getting married. We just figured we were married after getting a divorce and she put him out and he came back and begged my pardon and I took him back” [Tr. p. 206].

While considerable evidence was offered to show that since the ceremonial marriage of May 19, 1943, appellant

and Erwin held themselves out to be husband and wife in Los Angeles [Tr. pp. 167-184] the evidence as testified by appellant is that the only person she knew in Texas was Erwin's mother [Tr. p. 197].

After Erwin's death and before the funeral, respondent Oscar was present at a conversation between appellant and Mrs. Mabel Barnes. Mrs. Barnes asked appellant if she was married to Erwin and appellant stated no. Mrs. Barnes then said: "You should have made him marry you" [Tr. p. 151].

Nowhere in the record does appellant deny this statement. There is, in addition, numerous testimony that Erwin stated at various times that he was not married to appellant [Tr. pp. 148, 151, 157, 233].

Two days after Erwin's death, that is, on December 9, 1954, appellant filled out a claim for death benefits with the Metropolitan Life Insurance Company [Tr. pp. 185-186]. The form stated:

"I certify that all statements made on this claim are true to the best of my knowledge, information and belief, and that no evidence necessary to a settlement of this claim is suppressed or withheld" [Tr. p. 192].

Appellant listed the date of her marriage to decedent on this form as May 19, 1943 [Tr. p. 191]. Appellant stated her marriage was performed by a clergyman and not otherwise, and made no statement about common law marriage [Tr. pp. 192-193].

Issue Presented.

The issue presented by this appeal is whether Appellant is entitled to the proceeds of a federal employees group life insurance policy on the life of Erwin Tatum, deceased, by virtue of being his widow.

ARGUMENT.

I.

The Finding of the Trial Court That at the Time of Appellant's Marriage Ceremony to the Deceased-Insured Erwin Tatum, There Was a Subsisting Undissolved Marriage Between Erwin and Mattie, Is Amply Supported by the Evidence.

The quantum of proof necessary to rebut the presumption arising in favor of the second of two successive marriages is stated as follows in *Estate of Smith* (1949), 33 Cal. 2d 279, 281, 201 P. 2d 539:

“ . . . the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage . . . That burden is sustained if the evidence in the light of all reasonable inferences therefrom shows that the first marriage was not so dissolved or annulled.”

There is no room in the instant case to presume Erwin's first marriage was terminated by the death of his first spouse, Mattie, since she appeared at the trial. At the time of the second marriage Erwin had no right to presume her death since he had seen her every year since the separation and she was not generally reputed to be dead [Tr. p. 148]. In this respect, Erwin told Appellant not that he was a widower but that he was a divorcee. Appellant's belief about Erwin's marital status at the time of the second marriage would be immaterial in this respect.

The record shows that from the time of Erwin's separation from Mattie in August of 1935 until he went into military service, he lived in Texas in the following places only: Leon County, Dallas County, Tarrant County (Ft.

Worth), Limestone County (Mexia) [Tr. pp. 145-147]. After his separation from military service until his death, he resided in Los Angeles County [Tr. p. 4].

Appellees produced the original file of Los Angeles Superior Court D-367319 in the trial court, this file being an action of divorce commenced by Mattie Tatum against Erwin and certified copies of the property settlement therein dated October 7, 1948, the interlocutory judgment entered October 29, 1948, and the final judgment entered November 30, 1949, were admitted as Defendant's Exhibit "A" [Tr. p. 133].

A certificate from Harold J. Ostly, the Clerk of the Los Angeles Superior Court, that a search had been made of all the divorce files with the County and that the above was the only record of any legal action between these parties was received without objection as Defendant's Exhibit "D" [Tr. p. 144].

Certificates from the District Clerks of each of the Texas counties that search for divorce between these parties was made covering a period between January 1, 1935, and December 31, 1944, and that none could be found were admitted as Defendant's Exhibits "E", "F", "G" and "H" [Tr. pp. 145-147]. The same were later stricken on appellant's motion [Tr. pp. 246-247] but were unnecessary to the decision in the face of other evidence.

On October 7, 1948, both Erwin and Mattie appeared before a Notary Public and subscribed acknowledgments in their property settlement. The property settlement stated they were husband and wife and that there was pending in the Superior Court of Los Angeles a suit for divorce [Tr. p. 132-133; Deft. Ex. "A"]. In May of 1948, without any legal proceeding, Erwin left Appellant

and resumed marital relations with his wife Mattie [Tr. pp. 138-139]. While Erwin was in service, appellant attempted to secure an allotment as his wife. She was denied on the ground that she was not the wife [Tr. p. 204]. Mattie received the allotment as the wife of Erwin [Tr. p. 140]. Mattie was never served with any summons or complaint for a divorce proceeding prior to October of 1948 [Tr. p. 144].

All of these events took place long after Erwin's last residence in Texas. Appellant's argument "There is no evidence that Erwin failed to obtain a divorce in the states where he resided between 1927 and 1943" is therefore refuted by Erwin's later actions. In addition to his actions, there is evidence of declarations that Erwin had not terminated his marriage to Mattie [Tr. p. 141]; and there is appellant's testimony that she discussed prosecuting Erwin for bigamy with Mattie [Tr. pp. 140, 202], and that she discussed remarrying Erwin [Tr. p. 167], and appellant's undenied admission to Mrs. Barnes [Tr. p. 151].

In the light of all reasonable inferences, the evidence shows that prior to November of 1949 the first marriage was not dissolved by divorce or annulment. Appellant, however, assumes every fact favoring her claim by the statement, "On the other hand, the evidence clearly established that Erwin obtained a divorce prior to his ceremonial marriage to appellant".

The evidence Appellant refers to is solely Erwin's declaration on an Army form that he was divorced [Tr. pp. 160-161].

Appellant is unfair to the trial court in quoting certain portions of the transcript about burden of proof and pre-

sumption on page 13 of her brief in that said portions are out of context, did not contain a ruling of the court as contended, no offered evidence was rejected and if it were it only would have worked a disadvantage upon Appellees.

Finally, the point is moot because the evidence and the reasonable inferences therefrom heavily preponderate against the presumption.

Appellant's argument that the divorce decree is not *res adjudicata* against her is another example of a straw man she sets up for the purpose of knocking down. Neither appellees nor the court ever contended that it was or that it established anything as a matter of law. It was just one of a long series of actions and declarations of Erwin Tatum and appellant indicating that prior thereto he had never initiated a divorce against Mattie.

Appellant's next point is that the original marriage between Erwin and Mattie in 1927 wasn't valid. While the divorce decree may not be *res adjudicata* as to appellant, it certainly was as to Erwin. The testimony of Mattie that she married Erwin at Tyler, Texas, on January 1, 1927 [Tr. pp. 133, 147], the raising of four children to maturity in one community in Texas, a common law marriage state [Tr. pp. 136-137], the collection of the allotment as Erwin's wife [Tr. pp. 149-150] is entirely sufficient to show the existence of the relationship without the marriage certificate [Tr. p. 136; Ex. "C"].

II.

The Trial Court's Finding That Appellant Did Not Agree to Become the Common Law Wife of the Insured-Decedent Is Amply Supported by the Evidence.

Appellant first predicates her claim as common law wife upon a misstatement of the applicable law. *Ray v. Thompson* (1953), 261 S. W. 2d 251; *Baker v. Mays & Mays* (1947), 199 S. W. 2d 279; and *Hill v. Smith* (1944), 181 S. W. 2d 1051, do not stand for the proposition appellant contends, but instead affirm the statement contained in *Texas Employers v. Soto*, 294 S. W. 639, where the court states concerning common law marriage at page 640:

“To constitute the marital relation of husband and wife at common law, there must be a mutual consent or agreement expressed or implied between the man and woman to become then and thenceforth husband and wife, and pursuant to such consent or agreement followed by a living together in such agreed relationship. Such consent or agreement without a living together as husband and wife, or a cohabitation or living together without such agreement would not in this State constitute a common law marriage.”

Further, where the party offers direct testimony of an agreement, if such testimony fails to sustain a sufficient agreement, neither

“cohabitation nor declaration, nor reputation, separate nor combined, will prove marriage.”

Schwingle v. Keifer (1911), Tex. Civ. App. 135 S. W. 194;

Perales v. Flores (1941), Tex. Civ. App. 147 S. W. 2d 974.

The court found that appellant did not in the State of Texas agree with Erwin to become husband and wife as a lifelong relationship [Tr. p. 60]. Appellant testified to an alleged conversation in Texas with Erwin which purported to show an express agreement [Tr. pp. 83, 167], but which is insufficient in that it failed to show a meeting of the minds and further showed an acquiescence only in Erwin's misconceptions of the law of marriage. This purported conversation was uncorroborated by any other witness although there was claimed to have been an available witness. Appellant testified that after the divorce she and Erwin just figured they were married, and that there was no discussion about getting married [Tr. p. 206]. In her claim to the insurance company she gave the date of her marriage as that of May 19, 1953 [Tr. p. 191], which was the date of the ceremonial marriage and where the insurance form asked appellant if marriage was ceremonial or otherwise and if otherwise to specify, appellant claimed a ceremonial marriage, failing to specify any other [Tr. pp. 191-193]. Appellant testified that in 1954 she and Erwin discussed having a *ceremonial* marriage in Texas. Further, there was evidence of appellant's admission to Mrs. Barnes that she hadn't married Erwin [Tr. p. 154].

The finding of the trial court with respect to reputation was that at all times after the ceremonial marriage appellant held herself out as married to Erwin. Appellant perverts this into a claim that the evidence showed and that the court found the holding out to be in Texas but there was no community in Texas that knew appellant and Erwin as husband and wife. All the evidence in this respect proved their reputation in Los Angeles, and the only person appellant knew in Texas was Erwin's mother [Tr. p. 197].

Appellant next cites *Estate of McKenna* (1951), 106 Cal. App. 2d 126, 234 P. 2d 673, and *Bobbitt v. Bobbitt* (1920), 223 S. W. 478, which are both distinguishable from the instant case in that the relationships started in Texas and the relationship from its beginning was a lawful one and not meretricious. Further, the *Bobbitt* case does not stand for the proposition appellant claims it does since the case involved evidence of an express agreement by two Texans, a living together in Texas after the agreement for 4½ years, followed by 20 years of living together outside of Texas.

Appellant's argument of domicile is entirely irrelevant since the trial court did not find the relationship lacking by reason of lack of domicile but by reason of lack of agreement.

Appellant next argues that as a matter of law, persons cohabiting become married in Texas when an impediment of a pre-existing marriage of one of them is removed. Not content with overlooking the requirements of agreement express or implied and reputation in the community in Texas where they lived, appellant cites cases which not only do not stand for this proposition but expressly repudiate it. Thus, *Consolidated Underwriters v. Kelly* (1929), 300 S. W. 981, 15 S. W. 2d 229, stands for the proposition that intention of the parties to marry may be shown circumstantially but that a sojourn in a state recognizing common law marriage does not itself convert a meretricious relationship to a lawful marriage. As pointed out in *Hill v. Smith* (1944), 181 S. W. 2d 1015, the circumstantial evidence rule is a practical necessity in Texas since the claiming widow is unable to testify to the agreement directly because of the local "deadman's statute". No doubt appellant has overlooked the fact that the statement

appellant claims the case stands for is specifically disproved upon its rehearing as follows:

“We do not approve the statement that a ‘sound public policy impels the law to infer consent’ under the circumstances found, but do agree that the facts as found authorized an inference of fact as to the matrimonial intent at a time when no legal impediment existed.”

Consolidated Underwriters v. Kelly, 15 S. W. 2d 229.

On the question of the effect of a sojourn into a state recognizing common law marriage, the *Kelly* case is of interest because of its factual similarity to the instant case. The facts are stated in the opinion, Tex. Civ. App. 300 S. W. 981, affirmed 15 S. W. 2d 229, in the following language:

“In 1902 Joe Kelley and Louisa Lane, appellant here, negro citizens of Louisiana, living at Amelia, Louisiana began living together and cohabiting as husband and wife, under an agreement that they would be husband and wife, on conditions that in Texas would have constituted a common law marriage. Without ever contracting a ceremonial marriage but living together under the agreement they made their home at Amelia, Louisiana, from 1902 to 1920. During these years Joe Kelley worked about a year in each of the states of Florida, Alabama, Mississippi and Texas. In all of these states it appears that common law marriages are recognized on the same legal principals as in this state. While Joe was working in Florida, Appellant visited him about three months, about two months in Alabama, about two months in Mississippi and about one month in Texas. While visiting Joe he received her as his wife, introduced her to her new

friends as his wife and they lived and cohabited as husband and wife, but their absence from Louisiana was only temporary, and during all these years they maintained their home at Amelia, La., recognizing that their absence from their home was only of a temporary nature, for the purpose of securing employment, and Louisa's visits to Joe were purely in the nature of visits and without any intention whatsoever of acquiring a residence in any of those states.

“Under the statement as made, the laws of Louisiana declared the relationship between Joe and appellant illegal and meretricious and their temporary sojourn in the states recognizing common law marriages did not convert their illegal relations into a lawful marriage.”

The California District Court of Appeal summarizes the Texas law on the subject *In re McKanna's Estate*, 106 Cal. App. 2d 126, 234 P. 2d 673, at 677, as follows:

“Where the contract of marriage is invalid under the law in the state in which it is made, the status of the parties thereafter will be regarded as meretricious and that status will follow them during any stay in Texas, unless there is a new agreement of marriage made in Texas followed by cohabitation and a public holding out, or unless they become domiciled in Texas. If the parties become domiciled in Texas, then and in that event, there is no necessity to prove a new agreement of marriage in Texas, but instead consent to a new marriage within that state will be inferred by reason of the original intent to marriage if there be cohabitation in Texas and a public holding out by the parties that they are husband and wife.”

In 2 Beale on Conflict of Laws, p. 675, Sec. 123.1, the following statement is made:

“Parties living together as man and wife in the place where the doctrine of common law marriage does not prevail will not be regarded as thereby married even in a state where the doctrine does prevail.

“If the parties habitually live together in a state which does not thereby create a marriage, they do not become married by temporarily living together in a state where common law marriage is permitted.”

To the same effect are the following cases:

In re Binger's Estate, 158 Neb. 444, 63 N. W. 2d 784;

Cruickshank v. Cruickshank, 193 Misc. 366, 82 N. Y. S. 2d 522, 525;

State, ex rel. Smith v. Superior Court, 23 Wash. 2d 357, 161 P. 2d 188, 192.

Likewise, *Curtin v. State* (1950), 155 Tex. Cr. 625, 238 S. W. 2d 187, does not stand for the proposition appellant claims it does. In this case the defense was raised in a criminal prosecution for failure to provide for minor children that the children were not legitimate. By Texas law, children of a putative marriage have a legitimate status. The trial court instructed the jury concerning putative marriage. The Texas court of Criminal Appeals stated that since the putative status ceased when the mother learned of the impediment and all the children were born after this knowledge, putative marriage was not an applicable issue. A second theory of the prosecution was that there was a common law marriage after the removal of the impediment. The court citing *Consolidated Underwriters v. Kelly*, 15 S. W. 2d 229, states that the conduct

of the parties is sufficient “to prove as a matter of *fact* that they intended their relationship to be marital.”

The decision rests, therefore, upon an implied in fact contract, not one implied in law by reason of removal of impediment as the appellant contends.

Upon rehearing, the court concluded it had been in error as to a fact and found one of the children was born during the time when the mother did not know of the impediment. Therefore, upon a rehearing, the court concluded that the instruction about putative marriage was proper.

The language quoted by appellant is dicta and refers to part of the instruction which charged a putative marriage may arise out of a common law marriage. This was not in point in this case since the putative marriage here arose out of an invalid ceremonial marriage. The appellant adds to the confusion by not quoting the entire paragraph or even entire sentences and giving this bit of dicta as the holding of the case which it was not.

Appellant's next point is that implied agreement is sufficient and may be found from cohabitation and a holding out to the community. The difficulty with appellant's position is that (1) there was no community recognizing common law marriage to which they held themselves out as married [Tr. p. 197]: (2) the implications from the evidence are contrary to appellant's contention and amply support the findings of the trial court. The relationship was meretricious in its inception and long before appellant went to Texas appellant was aware of that fact [Tr. p. 191]. The only rational inference from appellant's testimony is that the relationship continued the way it started and never changed. The evidence disclosed that neither she nor Erwin ever realized the necessity of an-

other marriage either ceremonial or common law after Erwin had secured his divorce from Mattie.

All the Texas cases examined by this writer are in accord that where the proof shows the original relationship was meretricious, there must be some evidence of a change in the relationship before an inference of common law marriage can arise.

In *Edelstein v. Brown*, 35 Tex. Civ. App. 625, 80 S. W. 1027, at p. 1028, the court makes the following statement:

“Nor is the presumption of a continuance of the illicit relations affected by a removal of a disability of marriage which existed when the relations began, unless there is a visible change in the manner of living. Where it is sought to show that the illicit relations have changed to legal ones, the burden rests upon the party attempting to show such change.”

In *Brown v. Brown*, 115 S. W. 2d 786, the court discusses the problem at page 788 as follows:

“The relationship being meretricious in its inception, the evidence that it later became lawful would have to be positive and satisfactory, which it is not. Certainly the original agreement, which resulted in the unlawful living together, was not sufficient to transform their adulterous relationship into a lawful one, upon the mere removal of deceased’s impediment to marriage when his wife procured a divorce. Even the evidence of this agreement, as we understand it, was testified to by appellant alone.”

In *Drummond v. Benson*, 133 S. W. 2d 154, the court makes a similar statement:

“Where the connection between the parties is shown to have been illicit in its origin, or criminal in its

nature, the law raises from it no presumption of marriage.”

Appellant argues that the burden is not upon her to prove an express agreement to become the wife of the deceased-insured Erwin and that she may prove an implied agreement. However, the only reasonable inference that can be drawn from the evidence is the one drawn by the trial court that there was no agreement, either express or implied. There is no question that appellant has the burden of proving the agreement of common law marriage. The general rule is as stated in 55 Corpus Juris, at p. 887 as follows:

“There is no presumption that persons are married. Accordingly, the burden of proving a marriage rests on the parties who asserted it, particularly where a common law marriage is asserted.”

Estate of Gill, 23 Cal. App. 2d 212, 72 P. 2d 771;
Ex parte Morgan, 106 Cal. App. 602, 289 Pac. 647;
King v. King's Unknown Heirs (Tex. Civ. App.),
16 S. W. 2d 160;

In re Estate of Baldwin, 162 Cal. 471, 123 Pac.
267;

Brown v. Brown (Tex. Civ. App.), 115 S. W. 2d
786-788.

The rule as to quantum proof in a claim of common law marriage is stated in the above cases, that in order to establish a common law marriage all the essential elements of such relationship must be shown by clear, consistent and convincing evidence, especially must all the essential elements of such relationship be shown when one of the parties is dead, and such marriage must be proved by a preponderance of the evidence.

III.

The Evidence Amply Supports the Trial Court's Conclusion That Appellant Is Not Entitled to the Status of Putative Wife of the Deceased-Insured Erwin Tatum.

Appellant's claim as putative spouse rests upon an irrelevancy and a misrepresentation.

The irrelevancy is contained in the statement "There is no question but that *at the time of the marriage ceremony* of May 19, 1943 appellant acted in good faith."

Appellant apparently finds it convenient to ignore the evidence of her own testimony that as early as 1944 she knew Erwin had another living wife. When appellant discovered the existence of a prior marriage and knew it to be undissolved, she ceased to occupy the status, if she ever had it, of putative spouse. Thus, in one of the cases cited by Appellant, *Curtin v. State*, 155 Tex. Crim. 625, 238 S. W. 2d 187, the court says:

"The status of a putative marriage ceased to exist when she learned of the impediment, there being an absence of good faith on the part of both parties thereafter."

Appellant further boldly misrepresents that the evidence clearly established that appellant believed that she was Erwin's wife after the 1943 ceremonial marriage and after Mattie's 1949 divorce. However, appellant's own testimony was as follows:

"The Court: Just a moment. I want to ask you a question. You knew that Mr. Tatum got a divorce from his first wife, did you not?"

The Witness: That was when he was discharged, yes.

The Court: You knew when the case came up in court here in Los Angeles?

The Witness: Yes.

The Court: And you and he were living together at that time as husband and wife?

The Witness: Yes, sir.

The Court: So you did know that he had a previous marriage that had not been terminated at that time?

The Witness: Yes, at that time" [Tr. p. 191].

Having assumed the existence of a set of facts favoring her, but failing to specify in any particular why the findings are not supported by the evidence, appellant fills out her brief with elementary propositions of law about the rights of putative spouses.

If appellant is not entitled to a status of putative spouse, there is little merit in accusing the court of making a distinction between lawful widow as opposed to putative widow which the court, in fact, did not do. On the contrary, lawful widow would be any spouse the law recognizes as the widow and there is nothing in the record to indicate that the court excluded a putative widow from the definition of lawful.

Conclusion.

The findings of the trial court are supported by the evidence. The judgment should be affirmed.

Respectfully submitted,

ALAN ROSS,

Attorney for Appellees.

No. 15140

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERTHA TATUM,

Appellant,

vs.

OSCAR TATUM, VAL GENE TATUM, and RUBY FAY JOHNSON,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Statement of the Case.

Appellees inadvertently made a number of errors in the Summary of Material Facts in their brief. These are called to the Court's attention as follows:

1. Appellees on page 4 of their brief state that Mattie obtained an allotment from Erwin "as a serviceman's wife." Mattie testified that she was paid an allotment while Erwin was in the service [Tr. p. 140]. However, nowhere in the record does it appear whether said allotment was awarded to Mattie for the support of Erwin's minor children, or otherwise.

2. Appellees state on page 4 of their brief that appellant was denied a military allotment on the ground that she was not Erwin's wife. This is contrary to the record. Appellant testified that the reason she was denied an allotment was because she was unable to furnish the Army with a copy of Erwin's divorce decree from Mattie [Tr. p. 204].

3. Appellees state on page 6 of their brief that Erwin executed a property settlement agreement with Mattie on October 7, 1948, stating therein that he and Mattie were then husband and wife. However, the agreement stated that it was entered into by Erwin as one of the parties who was "hereinafter referred to as the husband." Such a reference to Erwin was merely *descriptio personae* and not a statement that he was then the legal husband of Mattie.

4. Appellees state on page 8 of their brief that appellant told one Mrs. Barnes that she was not married to Erwin. Examination of the record reveals that such statement was not made with reference to Erwin:

"Q. Did you overhear a conversation between Bertha Tatum and Mrs. Mabel Barnes? A. I did.

Q. Will you tell the Court, please, what that conversation was? A. Well, Mrs. Barnes asked her if they were married and she told her no, and she said, 'You should have made him marry you.' " [Tr. p. 152.]

The person referred to in the conversation is not identified in the record.

ARGUMENT.

I.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, Because She Is the Widow of Said Insured by Virtue of the Ceremonial Marriage Entered Into on May 19, 1943.

In their brief, appellees apparently admit that the burden of proof was upon them to establish:

1. That the alleged 1927 marriage between Erwin and Mattie was valid, and
2. That said marriage, if valid, had not been dissolved by divorce or annulment at the time of the ceremonial marriage between Erwin and appellant.

Appellees apparently concede that there is no evidence establishing whether, at the time of the alleged 1927 marriage between Mattie and Erwin, said parties were competent to contract marriage to each other. Moreover, appellees assert in the instant action that the entering into of a marriage ceremony between Erwin and appellant was insufficient to make said marriage valid. Accordingly, the entering into of a marriage ceremony between Erwin and Mattie was likewise insufficient to make said prior marriage valid. Thus, Mattie's alleged marriage to Erwin is presumed invalid in the absence of evidence to the contrary. There is no such evidence in the record.

However, assuming *arguendo* that Mattie's 1927 marriage was valid, appellees assert that they have established that said marriage was not terminated by divorce or an-

nulment prior to the May, 1943 ceremonial marriage between Erwin and appellant. Appellees contend that the following evidence is sufficient to rebut the presumption that said prior marriage had not been dissolved:

1. The execution by Erwin on October 7, 1948, of the property settlement agreement with Mattie. Appellees urge on page 10 of their brief that the property settlement agreement stated that Erwin and Mattie were husband and wife. However, the property settlement agreement merely described Erwin for purposes of said agreement as "husband." Use of the term "husband" was merely *descriptio personae*. Such language, as a matter of law, was not an intimation that it was to apply to Erwin in the technical class of Mattie's husband.

26 C. J. S. 1235;

Black's Law Dictionary (3d Ed.), p. 564.

Thus the agreement was not a declaration by Erwin that he was then Mattie's legal husband. If the language of the agreement had specified that Erwin was to be thereafter referred to as "ambassador," no one could seriously contend that Erwin agreed that he was then an ambassador.

2. Appellees argue that Erwin's resumption of marital relations with Mattie established that they were then married. However, since appellees contend that marital relations between Erwin and appellant did not establish their marriage, likewise Erwin's relations with other women would not establish any other marriage.

3. Appellees assert that since appellant's allotment was denied, Erwin and Mattie must have been still married. However, such argument overlooks the fact that the only

reason that an allotment was denied appellant was because she failed to produce Erwin's divorce decree from Mattie. Such failure established non-compliance with military regulations, not illegality of her marriage to Erwin.

4. Appellees assert that, since Mattie received an allotment, she must have been the wife of Erwin. Again, this argument overlooks the fact that the evidence does not establish the nature of the allotment received by Mattie.

5. Appellees assert that Mattie was never served with divorce papers. However, this does not establish that Mattie was not served with annulment papers prior to said date, nor that Erwin could not have procured a valid divorce without personal service upon Mattie.

6. Finally, appellees assert that Erwin's oral declarations were sufficient to establish the invalidity of his marriage to appellant. With respect to said contention, the United States Supreme Court, in *Gaines v. Relf* (1851), 53 U. S. 472, 533, stated that:

“ . . . To hold that either of the parties could, by a mere declaration, establish that a marriage was void, would be an alarming doctrine.”

Thus, appellees, as a matter of law, have failed to rebut the presumption of validity of the ceremonial marriage between Erwin and appellant.

The Fifth Circuit recently upheld the presumption of validity of ceremonial marriage in awarding the proceeds of a National Service Life Insurance policy, in *United States v. Marlow* (1956), 235 F. 2d 366, a fac-

tually stronger case than the instant one. The court stated as follows on page 368:

“It appears without contradiction that the two were united in a ceremonial marriage under proper certificate on February 7, 1942. Both parties lived in California, and it is agreed that the validity of the marriage is to be determined under the law of that state. Under that law and under the general law such a marriage is presumed to have been legal and valid and one asserting its invalidity bears the burden of proving such invalidity.

“The United States contends, on behalf of Mary, that a marriage once established is presumed to continue. But this presumption is displaced by the presumption of the validity of a second marriage; and to overcome the latter presumption *positive proof* must be adduced to establish that the prior marriage was never dissolved by judicial decree or death.” (Emphasis added.)

In the instant action, appellees have failed to introduce such *positive proof* as required by law to rebut the presumption of validity of the 1943 ceremonial marriage between Erwin and appellant. Accordingly, the findings of fact and conclusions of law in conflict with the presumption are erroneous. Specifically, finding No. 4 that, at the time of said ceremonial marriage, there was a superseding undissolved marriage between Erwin and Mattie, finding No. 9 that the marriage between Erwin and Mattie was dissolved by final judgment of divorce, finding No. 10 that in October, 1948, Erwin and Mattie executed a property settlement agreement declaring that they were husband and wife, finding No. 12 that appellant was aware of the fact prior to September, 1948, that Erwin had a living undivorced wife, and finding No. 16

that the allegation of plaintiff's complaint that she was the widow of Erwin was untrue, are not supported by the evidence [Tr. pp. 58-60].

Moreover, conclusion No. 1 that Erwin lacked legal capacity to enter into the ceremonial marriage of May 19, 1943, and that said ceremonial marriage was null and void, conclusion No. 5 that appellant is not the lawful widow of Erwin, conclusion No. 7 that appellees are entitled to the benefits of said insurance policy, and conclusion No. 8 that plaintiff take nothing by her complaint, are contrary to the law set forth herein [Tr. pp. 61-62].

II.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, as the Widow of Said Insured by Virtue of a Texas Common Law Marriage Entered Into Subsequent to the 1949 Divorce Between Mattie and Erwin.

Even if her ceremonial marriage was void, appellant is the legal widow of Erwin by virtue of a Texas common law marriage occurring subsequent to 1950.

Although the trial court repeatedly questioned whether a California domiciliary could contract a Texas common law marriage, appellees apparently concede that this is no longer an issue on page 15 of their brief.

On the other hand, appellees assert that common law marriage is a question of agreement and that the evidence established, and the trial court found, no agreement.

However, binding Texas authority conclusively sets forth that common law marriage can be created in the absence of agreement. *Curtin v. State* (1950), 155 Tex.

Cr. 625, 238 S. W. 2d 187, holds that a common law marriage occurs where the parties contract an invalid marriage in good faith and cohabit as husband and wife after removal of the impediment to said marriage.

See, also:

Consolidated Underwriters v. Taylor (1946), 197 S. W. 2d 216.

In this case, appellant in good faith entered into a ceremonial marriage. Even if said ceremonial marriage was void, the parties cohabited together as husband and wife in Texas after Mattie's California divorce removed the impediment to the validity thereof. Since domicile apparently is no longer an issue, the doctrine of *Curtin v. State* would apply and thus a common law marriage was created.

Appellees seek to avoid the impact of the *Curtin* case by arguing that such is not the holding thereof. However, the rule enunciated herein and in appellant's opening brief was the *law* of the case pronounced by the Court, on page 192, in overruling a motion for rehearing. The Court merely quoted the general doctrine announced in 55 C. J. S. 881, 882.

Appellees, however, quote the following language on page 19 of their brief: “. . . to prove as a matter of fact that they intended their relationship to be marital.” Appellees thus argue that the decision of the *Curtin* case rests upon an implied in fact contract and not one implied in law by reason of removal of impediment.

However, the above excerpt comes from 238 S. W. 2d 187, where the Texas appellate court itself quoted an earlier decision of said court. However, the portion quoted by appellees is not the holding of the *Curtin* case.

Accordingly, under the doctrine of the *Curtin* case, a common law marriage as a matter of law was created upon cohabitation by appellant and Erwin in Texas as husband and wife after 1950.

Moreover, assuming *arguendo* that appellees' position is correct and that there must be an express or an implied in fact agreement, the evidence unequivocally established that there was such an agreement.

After Mattie's divorce, Erwin and appellant resided in Texas for periods of time [Tr. pp. 165, 167, 213]; Erwin sought employment in Texas and appellant and Erwin intended to domicile in Texas should Erwin find a job [Tr. pp. 164-166, 210]; while in Texas, they cohabited and held themselves out to the public as husband and wife [Tr. pp. 167-171]; during their sojourn in Texas they lived together, registered at motels as husband and wife [Tr. pp. 167-169] and received mail addressed to them as "Mr. and Mrs. Erwin Tatum" [Pltf. Ex. 6; Tr. p. 171].

Moreover, Erwin and appellant while in Texas discussed their relationship in the light of Mattie's California divorce. Appellant told Erwin that it was time for them to "fix this over". Erwin answered that there was no need because he was already married to her in Texas and that he was her husband. Appellant agreed [Tr. pp. 166-167, 200-201]. Moreover, the parties believed that they were married in Texas [Tr. pp. 8, 205-206].

Under these circumstances, the evidence clearly establishes both an express and implied agreement to become husband and wife in Texas.

Appellees next quote 2 Beale on Conflicts of Law 675, to the effect that domiciliaries of one State cannot acquire

a common law marriage by temporarily living together in a common law marriage State. However, this question is to be determined under California law and the California courts have held that California domiciliaries can acquire foreign common law marriage.

See:

Estate of McKanna (1951), 106 Cal. App. 2d 126,
234 P. 2d 673.

Thus the trial court's finding No. 12, that appellant and Erwin did not agree to become husband and wife in Texas, is directly contrary to the evidence and conclusion No. 4, to the effect that appellant and Erwin did not become husband and wife after November 30, 1949, is contrary to both the evidence and the doctrine of the *Curtin* case [Tr. pp. 60, 61].

III.

Appellant Is Entitled to the Insurance Proceeds on The Life of Erwin Tatum, Deceased, as the Puta- tive Spouse of Said Insured.

Appellees concede, on page 23 of their brief, that if appellant was the putative spouse of Erwin, she would be entitled to the insurance proceeds in this case as Erwin's lawful widow.

Appellees next argue that, from the date appellant learned of Mattie's 1949 divorce from Erwin, she ceased having the status of putative spouse.

However, the uncontradicted testimony is that after appellant learned of Mattie's divorce she prevailed upon Erwin to rectify the situation. Erwin told her there was no need because he was already married to her in Texas

and that he was her husband. Thereafter, appellant believed that she was married to Erwin [Tr. pp. 8, 166-167, 184-185, 200-201, 205-206, 209].

Thus, after Mattie's 1949 divorce appellant believed that she was married to Erwin. The record overwhelmingly establishes that such was a good faith belief. Since the basic element of a putative marriage is the good faith belief in a valid marriage, appellant was the putative spouse of Erwin whether that putative marriage had its origin at the time of her ceremonial marriage or after Mattie's 1949 divorce.

Valera v. Valera (1943), 21 Cal. 2d 681, 684,
134 P. 2d 761.

Accordingly, the trial court's conclusion No. 2, that appellant is not entitled to the status of putative spouse, is not supported by the evidence [Tr. p. 61].

Conclusion.

The judgment should be reversed and judgment should be ordered in favor of appellant.

Respectfully submitted,

ARTHUR N. GREENBERG,

Attorney for Appellant.

No. 15141

United States
Court of Appeals
for the Ninth Circuit

BARTHOLOMAE CORPORATION,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILE

SEP -5 1956

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Southern District
of California, Central Division

No. 14795-WB

BARTHOLOMAE CORPORATION, a Corpora-
tion,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Count One (Tort Claim)

I.

Plaintiff is a California corporation having its principal office for the transaction of business at Fullerton, Orange County, California, and is, therefore, a resident of the Southern District of California, Central Division.

II.

Jurisdiction is invested in this Court by Title 28, Section 1346 (b), U.S.C.

III.

Plaintiff at all times herein mentioned was and now is the owner of certain real property and the improvements thereon located in Eureka County, Nevada, and known as the Fish Creek Ranch. The improvements thereon included four buildings, [2*] commonly known and herein identified as (1) Bartholomae Cottage; (2) office building; (3) mess hall,

*Page numbering appearing at foot of page of original Certified Transcript of Record.

and (4) bunk house, which structures are the improvements which became damaged as hereinafter alleged.

IV.

The Atomic Energy Commission is a federal executive agency created by Title 42, Section 1802 (a)(1), U. S. C.

V.

Commencing on or about October 22, 1951, and on various occasions thereafter through November 5, 1951 (the exact dates and times being unknown to plaintiff) the defendant, United States of America, by and through said Atomic Energy Commission detonated certain high explosives, commonly known as atomic bombs or atomic weapons, within the State of Nevada at or near a site known as Frenchman's Flat, in such a negligent and careless manner, considering the known force of such explosions and the effects thereof to be anticipated, as to forcibly and violently shake the improvements described in Paragraph III hereof.

VI.

As a direct and proximate result of the impact of such explosions upon said improvements, plaintiff's said property was damaged in the sum of Five Thousand Dollars (\$5,000).

Count Two (Tort Claim)

I.

Plaintiff refers to the allegations contained in Paragraphs I, II, III, IV and VI of its First Count

and by such reference adopts and repleads the same herein.

II.

Commencing on or about October 22, 1951, and on various occasions thereafter through November 5, 1951, (the exact dates and times being unknown to plaintiff) the defendant, United [3] States of America, by and through said Atomic Energy Commission, and while said explosive materials and all activities herein referred to and the area in which activities were conducted were in the exclusive secret control of said defendant, negligently detonated certain high explosives, commonly known as atomic bombs or atomic weapons within the State of Nevada at or near a site known as Frenchman's Flat.

III.

That such explosions forcibly and violently shook plaintiff's land known as the Fish Creek Ranch and the improvements thereon.

Count Three (Absolute Liability; Claim for Non-Tortious Damages)

I.

Plaintiff refers to the allegations contained in Paragraphs I, III, IV and VI of its First Count and by such reference adopts and repleads the same herein.

II.

Jurisdiction is invested in this Court by Title 28, Section 1346(a)(2), U. S. C.

III.

Commencing on or about October 22, 1951, and on various occasions thereafter through November 5, 1951, (the exact dates and times being unknown to plaintiff) the defendant, United States of America, by and through said Atomic Energy Commission, intentionally and purposely detonated certain high explosives, commonly known as atomic bombs or atomic weapons, within the State of Nevada at or near a site known as Frenchman's Flat.

IV.

That the then known force of such explosions was such that the conducting of such activity was ultra-hazardous and necessarily involved a risk of serious harm and damage to property [4] within the vicinity thereof and not owned by defendant. That such damage could not have been eliminated by the exercise of utmost care upon the part of defendant. That the detonation of atomic bombs and weapons was not then a matter of common usage, and, to the contrary, was prohibited by law except as to the defendant.

Count Four (Damages for Taking)

I.

Plaintiff refers to the allegations contained in Paragraphs I, III and IV of its First Count and by such reference adopts and repleads the same herein.

II.

Jurisdiction is invested in this Court by Title 28, Section 1346 (a) (2), U.S.C.

III.

That between October 22, 1951, and November 6, 1951, defendant, United States of America, by and through said Atomic Energy Commission, intentionally took and acquired the right and privilege to shake and damage plaintiff's Fish Creek Ranch property and the affixed improvements thereon as an unavoidable result of its intentional detonating of atomic bombs and atomic weapons in the State of Nevada, at or near a site known as Frenchman's Flat. That such taking was authorized by Title 42, Section 1806 (a) (1), U. S. C.

IV.

That through such taking plaintiff's said property was damaged in the sum of Five Thousand Dollars (\$5,000).

Wherefore, plaintiff demands judgment against defendant for the sum of Five Thousand Dollars (\$5,000) and for such other and general relief as the Court shall find it entitled to.

/s/ IRL D. BRETT,

Attorney for Plaintiff.

[Endorsed]: Filed December 2, 1952. [5]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and for its answer to the complaint on file herein, admits, denies and alleges as follows:

Count One (Tort Claim)

I.

The defendant does not have sufficient information upon which to form a belief as to the truth of the allegations set forth in Paragraphs I and III of Count One, and on said ground denies each and every allegation therein contained.

II.

The defendant admits the allegations contained in Paragraph IV of Count One of said complaint.

III.

The defendant denies each and every allegation contained in Paragraphs V and VI of Count One of said complaint, and specifically denies that [6] the plaintiff has been damaged in the sum of Five Thousand Dollars (\$5,000.00) or in any other sum whatsoever.

Count Two (Tort Claim)

I.

Answering Paragraph I of Count Two of the within complaint, this defendant admits, denies and alleges in answer to the paragraphs of the First Count adopted by reference therein to the same

effect and in the same manner as this answering defendant admitted, denied and alleged in answer to those specific paragraphs of Count One Herein.

II.

The defendant both generally and specifically denies each and every allegation in Paragraph II of Count Two of plaintiff's complaint.

III.

The defendant does not have sufficient information upon which to form a belief as to the truth of the allegations set forth in Paragraph III of Count Two of this complaint, and on such ground denies each and every allegation therein contained.

Count Three (Absolute Liability Claim
for Non-Tortious Damages)

I.

Answering Paragraph I of Count Three of the within complaint, this defendant admits, denies and alleges in answer to the paragraphs of the First Count adopted by reference therein to the same effect and in the same manner as this answering defendant admitted, denies and alleged in answer to those specific paragraphs of Count One herein.

II.

The defendant both generally and specifically denies each and every allegation contained in Paragraphs III and IV of Count Three of this [7] complaint.

Count Four (Damages for Taking)

I.

Answering Paragraph I of Count Four of the within complaint, this defendant admits, denies and alleges in answer to the paragraphs of the First Count adopted by reference therein to the same effect and in the same manner as this answering defendant admitted, denied and alleged in answer to those specific paragraphs of Count One herein.

II.

The defendant both generally and specifically denies each and every allegation contained in Paragraphs III and IV of Count Four of this complaint; further answering Paragraph IV defendant both generally and specifically denies plaintiff's property has been damaged in the sum of Five Thousand Dollars (\$5,000.00) or in any other sum whatsoever.

Wherefore, this answering defendant prays that judgment be entered in favor of the defendant and against the plaintiff herein, that the defendant have its costs and disbursements incurred herein, and that the defendant have such other and further relief as to the Court may seem meet and just.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U.S. Attorney,
Chief of Civil Division;

/s/ MAX F. DEUTZ,

Assistant U.S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 24, 1953. [8]

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED
PRE-TRIAL ORDER

At a conference held under Rule 16 F.R.C.P. by direction of William M. Byrne, Judge, the following admissions and agreements of fact were made by the parties and require no proof:

1. Plaintiff is a California corporation and is a resident of the Southern District of California, Central Division.

2. Plaintiff was on October 22, 1951, and has ever since been and now is the owner of the real property and of the improvements thereon located in Eureka County, Nevada, and known as the Fish Creek Ranch.

3. On October 22, 1951, and at all times thereafter, said ranch was and is improved with four buildings which will be referred to in the trial in this cause as:

- (a) Bartholomae Cottage,
- (b) Office Building,

- (c) Mess Hall, and
- (d) Bunk House.

4. On October 22, 1951; October 28, 1951; October 30, [53] 1951; November 1, 1951, and November 5, 1951, the United States of America, acting by and through its executive agency, the Atomic Energy Commission, and acting under the express mandate of the Congress, performed experiments with high explosives commonly known as atom bombs or atomic weapons through nuclear detonations thereof within the State of Nevada at or near an isolated, closely guarded and secret site commonly known as Frenchman's Flat and officially known as the Nevada Proving Grounds, which site was about 65 miles northwest of Las Vegas and between 145 and 150 miles southeast of plaintiff's ranch.

5. Prior to October 22, 1951, the Atomic Energy Commission had determined that a continental test area was necessary for the conduct of nuclear explosive experiments and that the area now known as the Nevada Proving Grounds was desirable as a location therefor, and the President of the United States of America had established the Nevada Proving Grounds as an area for the testing of Atomic devices.

6. The experiments conducted between October 22, 1951, and November 5, 1951, consisted, in part, of detonating weapons containing fissionable and radioactive materials which created and caused

blast waves and air shock waves which could reach into and bounce or rebound from atmospheric layer elevations which surround the earth and which are defined as (1) the Troposphere, an air mass layer within the area from the earth's surface to an elevation of 6 miles; (2) the Ozonosphere, an air mass layer between 25 and 40 miles above the earth's surface, and (3) the Ionosphere, an air mass layer 50 or more miles above the earth.

7. The United States, through previous experiments made by the Atomic Energy Commission, knew that these shock waves were capable of extreme, erratic and uncontrollable destruction and property damage; [54] that similar (though not necessarily the same intensity of) explosive tests had caused widespread damage for which it had assumed liability in reports to Congress and for which Congress had appropriated funds for payment.

Issues of Fact to Be Tried

1. The nature and extent of the damages to plaintiff's property.
2. The cause of such damage.
3. The liability of the United States for such damage.
4. The methods employed by the Atomic Energy Commission in conducting such experimental detonations.

Issues of Law

1. Did the activities of the persons conducting such experimental detonations constitute an actionable tort for which the United States is liable under Title 28, Section 1346(b) U.S.C.A.?

2. Is the United States excepted and excused from liability by virtue of the provisions of Title 28, Section 2680(a) U.S.C.A.?

3. Is the doctrine of *res ipsa loquitur* applicable?

4. Did the activities of the persons conducting such experimental detonations constitute an actionable taking for which the United States is liable under the Fifth Amendment to the Federal Constitution and Title 28, Section 1346 (a) (2) and the [55] provisions of Title 42, Section 1806 (a) (1) U.S.C.A.?

5. Did the activities of the persons conducting such experimental detonations with the intention and purpose of determining what damage would occur as the express result of such ultra-hazardous activity create an absolute liability, contractual in its nature, so as to constitute an actionable liability for unliquidated damages in a case not sounding in tort under Title 28, Section 1346 (a) (2) U.S.C.A.?

6. Did the reports by the Atomic Energy Commission of damages resulting from conducting of similar experimental detonations at the Nevada Proving Grounds to the Congress with the request

that the Congress approve such agency's payment of damages to those whose property had been damaged constitute a recognition and approval by the Congress of liability of the United States for damages directly arising out of and caused by such experimental detonations?

The foregoing admissions of fact have been made by the parties in open Court at the Pre-Trial Conference; and issues of fact and law being thereupon stated and agreed to, this Court makes this Order which shall govern the course of the trial unless modified to prevent manifest injustice.

Dated: January 3, 1955.

/s/ WM. M. BYRNE,
Judge of the United
States District Court.

The foregoing Pre-Trial Order is hereby approved.

/s/ IRL DAVIS BRETT,
Attorney for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney;

By /s/ ANDREW J. WEISZ,
Assistant United States
Attorney.

[Endorsed]: Filed January 3, 1955. [56]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Defendant, United States of America, leave of court having been obtained, amends its answer herein as follows:

By adding immediately after paragraph 3 of the portion of answer relating to Count two (Tort Claim) the following:

For a Further Distinct and Separate Answer to Counts One and Two of Plaintiff's Complaint on File Herein, Defendant Alleges:

I.

That the detonations of atomic materials specified in counts one and two of plaintiff's complaint took place in the performance of a discretionary function or duty on the part of the Atomic Energy Commission, an agency of the United States of America, [57] and therefore plaintiff's claim may not be heard by this court nor recovery be had thereon, pursuant to Section 2680 of Title 28, United States Code.

Dated: This 8th of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ ANDREW J. WEISZ,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

It Is So Ordered:

This 8th day of March, 1955.

/s/ WM. M. BYRNE,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1955. [58]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Plaintiff, a California corporation, brings this action for damages to certain buildings located on land owned by the plaintiff and known as Fish Creek Ranch in Nevada. On October 22, 1951, through November 5, 1951, the United States, acting through its executive agency, the Atomic Energy Commission, performed experiments with atomic energy and nuclear detonations. These detonations took place about 150 miles southeast of the plaintiff's ranch at a site known as Frenchman's Flat, and allegedly caused the damage to the plaintiff's buildings.

The complaint is in four counts; the first two counts sounding in negligence, the third in liability without fault, and the fourth in eminent domain. The jurisdiction of this court is asserted to derive from 28 U.S.C.A., Sections 1346(b) and 1346(a)(2).

The evidence is not sufficient to support a finding [60] of negligence¹ nor a finding that the detonations were the proximate cause of the damage complained of; however, it is not necessary to rest decision on that ground. When Congress adopted the Tort Claims Act (28 U.S.C.A. 1346(b)) waiving the Government's immunity from actions for injuries to person or property occasioned by the tortious conduct of its agents, it provided that the waiver would not apply to "(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." (28 U.S.C.A. 2680). It is clear that if plaintiff's claims are based on the performance by defendant of a discretionary function, counts one, two and three must fall.

¹In count two the plaintiff relies upon the doctrine of *res ipsa loquitur*. This doctrine does not apply unless (1) defendant had exclusive control of the thing causing the injury and (2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant. *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 450, 150 P. 2d 436. The injury complained of in the instant case is the cracked plaster in the buildings located on the plaintiff's ranch. In the first place the evidence does not establish what "thing" caused the injury and in the second place the "accident" is of such a nature that it ordinarily occurs in the absence of negligence, i.e., from temperature changes and earth temblors. The doctrine of *res ipsa loquitur* has no application in situations such as this.

Prior to the detonations complained of, the Atomic Energy Commission had determined that a continental testing area was necessary to conduct experiments with atomic energy. For that purpose the President of the United States established the Nevada Proving Grounds for the tests. The experiments conducted between October 22, 1951, and November 5, 1951, consisted in part, of detonating weapons [61] containing fissionable and radioactive materials. The detonations caused blast waves and air shock waves which could reach into and bounce or rebound from atmospheric layer elevations that surround the earth. These shock waves are capable of erratic behavior and at the time of the acts complained of they could not be completely controlled.

Each test series, including the one involved here, emanates from the Los Alamos Laboratory. Initially, a description of the test series is included in the annual Laboratory Program, for the approval of the Atomic Energy Commission. Thereafter, a more detailed program is prepared in the Los Alamos Laboratory. It is then approved by the Santa Fe Operations Office, by the Division of Military Applications of the Atomic Energy Commission, and by the Atomic Energy Commission. Through the National Security Counsel, the Atomic Energy Commission receives the approval of the President to detonate the devices and expend the nuclear material. The test manager is then appointed and given authority to conduct the series. Thereafter, the test manager directs the test organ-

ization with regard to the schedule of operations to be followed, the sequence and dates of detonations and the procedure involved. The decision to detonate at a particular time is made by the test manager, upon the recommendation of a board of experts, each one foremost in his particular field, so that detonation can be accomplished with maximum safety.

As a part of this program to insure maximum safety it is necessary to determine atmospheric conditions so that the radius of the blast may be ascertained. As yet it is impossible to determine conditions at high altitudes with [62] absolute accuracy. Dr. Cox, a member of the team conducting the tests, devised a method of detonating high explosives approximately one hour prior to the blast and scaling up the reading in order to predict the expected blast pressure at the higher altitudes. This was accomplished by taking readings from microbarographs as close to the time of the blast as possible. Eight microbarographs, the available supply in the country, were secured and placed at strategic points according to the judgment of Dr. Cox. The readings were given to the panel of experts who weighed the information and advised the test manager as to blast safety. The test manager then made the decision whether to detonate or not.

The basis of the plaintiff's claims in the first two counts is the asserted negligence of Dr. Cox in placing all of the available microbarographs in the direction of the more populated areas of Las Vegas,

Henderson and Boulder City, and not placing one in a "northerly direction" towards the plaintiff's ranch. The plaintiff contends that the discretion exercised by Dr. Cox and his associates at the test site was not of the discretionary character stated to be not actionable by Section 2680.

In *Dalehite v. United States*, 346 U. S. 15 (1953), the Supreme Court discussing the scope of the discretionary function protected by Section 2680 said at page 35 "* * * the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there [63] is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."

It would appear that the experimental activity involved here is precisely the type of function or duty which Congress did not intend to be actionable under the Tort Claims Act. Here we have a program authorized at the very highest level of Government, to be carried out for the public benefit with important decisions to be made all through the preparation until the final detonation. To say that the decisions made in carrying out the basic plan approved by the President are not discretionary

would be clearly contrary to the intent of Congress and the principles enunciated in the Dalehite case.

There is an additional reason why there can be no recovery on count three which is founded on a theory of absolute liability without fault where the Government is engaged in an ultra-hazardous activity. In Dalehite v. United States, supra, the court stated that liability under the Tort Claims Act does not arise by virtue of the United States engaging in an extra-hazardous activity and that it is to be invoked only on a negligent or wrongful act or omission of an employee. See also United States v. Ure, F. 2d (C.A. 9, Sept., 1955); Rayonier Incorporated v. United States, 225 F. 2d 642 (C.A. 9).

In count four the plaintiff alleges that the United States intentionally took and acquired the right and privilege to shake and damage his property as an unavoidable result of its intentional detonating of atomic bombs; that this action was a taking for public use within the meaning of the Fifth Amendment to the Federal Constitution, and is [64] therefore compensable. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has either been acquired by agreement or in course of time." United States v. Dickinson, 331 U. S. 745, 748. It is the intent of the party who, it is claimed, has asserted a proprietary interest which is the determining factor. this intent may be manifested by a single deliberate

act or it may be inferred by continuous or repeated acts, but a single isolated and unintentional act of the United States resulting in damage or destruction of property is not a taking in a constitutional sense. *Harris v. United States*, 205 F. 2d 765 (C.A. 10). It follows that even if we were to assume that the damage which occurred to plaintiff's property in October, 1951, resulted from the detonation of an atomic bomb, it was not a taking for public use for which compensation was payable under the Fifth Amendment.

Judgment will be for the defendant. Counsel for the defendant will prepare, serve and lodge findings and judgment in accordance with local rule 7.

Dated, Los Angeles, California, November 2, 1955.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed November 2, 1955. [65]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial on the 10th and 11th days of May, 1955, before the Honorable William M. Byrne, Judge presiding; plaintiff having been represented by Mize, Kroese, Larsh & Mize and Irl Davis Brett, by Irl Davis Brett, defendant having been represented by

Laughlin E. Waters, United States Attorney; Max F. Deutz and Andrew J. Weisz, Assistants United States Attorney, by Andrew J. Weisz; and the Court having received evidence, both oral and documentary, and having considered briefs of counsel, and having been fully advised in the premises, makes the following:

Findings of Fact

I.

That this is a suit of a civil nature against the United States of America as defendant, wherein jurisdiction of this Court is allegedly derived from the provisions of Section 1346(a) (2) and [66] 1346(b) of Title 28, United States Code.

II.

That plaintiff, a California corporation, at all times involved herein, was the owner of property known as the Fish-Creek Ranch, which property is located in the State of Nevada approximately 150 miles northwest of Nevada Proving Grounds, commonly known as Frenchman's Flat.

III.

That in the period of time between October 22, 1951, and November 5, 1951, the United States, acting through its executive agency, the Atomic Energy Commission, performed experiments involving nuclear detonation at the Nevada Proving Grounds. The said experimentation caused the re-

lease of energy, one aspect of which was the appearance of blast or shock waves.

IV.

That during or about the period above referred to, plaster in the buildings on the land of plaintiff showed evidence of cracking.

V.

The atomic experimentation during the period above referred to comprised a number of tests, series of which emanate originally from the Los Alamos Scientific Laboratory. The description of test series is included in the Annual Laboratory Program and is approved by the Atomic Energy Commission. Thereafter, a more detailed testing program is prepared at the Los Alamos Scientific Laboratory, and is then approved by the Santa Fe Operations Office of the Atomic Energy Commission, by the Division of Military Applications of the Atomic Energy Commission, and by the Atomic Energy Commission itself. Through the National Security Council, the Atomic Energy Commission receives approval of the President of the United States to expend the nuclear material involved and to detonate the devices containing the nuclear material. [67]

VI.

Prior to the series involved herein, the Atomic Energy Commission had determined that a continental testing area was necessary in order to further experimentation of atomic energy. For that

purpose, the President of the United States established the Nevada Proving Grounds as the area in which continental testing might take place.

VII.

The President and the Atomic Energy Commission authorized the detonation of the devices used in the testing series that took place during the period involved herein, and directed that the testing take place at the Nevada Proving Grounds.

VIII.

After the approvals and authorizations described above, a Test Manager is, and was in this instance, appointed and given authority to conduct the series. The Test Manager directs the testing organization with regard to the schedule of operations to be followed, the sequence and dates of detonations, and the procedures involved.

IX.

In the conduct of the atomic experimentation, as described above, the quantity of detonative material in the devices is fixed at the highest executive level. The testing organization is instructed to accomplish the experimentation with maximum safety to the public. The variant factor insofar as public safety is concerned is weather.

X.

The Nevada Proving Grounds was chosen as a continental testing area by reason of excellent weather conditions and sparse population. Weather

conditions will effect the propagation of shock or blast waves. These waves emanate from the center of detonation in every direction, their energy becoming less effective upon any [68] particular object as the distance from detonation center increases. However, the waves may be bent down due to atmospheric conditions at higher elevations in the atmosphere. At the state of scientific progress attained at the time of the test series here in question, it was impossible to predict whether and where such bending might occur.

XI.

Dr. Cox, a member of the team conducting the tests, devised prior to the test series here in question a method of detonating high explosives approximately one hour prior to the nuclear detonation, and recording the effect of such explosions upon an instrument known as a microbaragraph. Eight microbaragraphs, the entire available supply in the United States, were secured and placed at strategic points according to the judgment of Dr. Cox. Upon detonation of the high explosive, Dr. Cox secured the microbaragraph readings, and scaled up the readings in order to predict the expected blast pressures from the atomic detonation at the microbaragraph locations. The eight microbaragraphs were placed in heavily-populated areas, none of which were in the vicinity of plaintiff's ranch.

XII.

The testing organization comprised a board of experts, each one foremost in his particular field, who advised the Test Manager with regard to optimum conditions of safety for detonation. With regard to each detonation in the series here involved, the board of experts was fully informed as to weather conditions, the location of the micro-barographs, and the scaled-up readings predicting blast pressures to be expected. The board approved detonation in each instance.

XIII.

The Test Manager, during the series here involved, had the information that the board of experts had, and the benefit of its [69] recommendation. In approving the detonation at the particular times and under the particular weather conditions then prevailing, the Test Manager determined that the testing was taking place under conditions optimal for the public safety under all the circumstances.

XIV.

The purpose of each test series is to determine the efficiency of the device used and efficacy of the detonation produced through use of the atomic elements. In every instance, it is the intent of the Atomic Energy Commission and the test organization to, insofar as is possible, confine the effects of the detonation to the Nevada Proving Grounds. During the period here involved, the Court finds that every precaution for the public's safety was

exercised, commensurate with the task to be performed, and the equipment and scientific knowledge available.

XV.

Upon the evidence before it, this Court cannot find that any officer or employee of the United States was negligent in the performance of his duties relating to atomic experimentation, or that the atomic detonations were the proximate cause of the damage to plaintiff's property. The Court finds that blast waves released from atomic detonations during the period in question may have reached the property of plaintiff on one or two occasions during the period involved. The Court further finds that as to each such blast wave from the atomic detonation reaching the land of plaintiff, if any, the shock wave was uncontrollable and unpredictable under the circumstances obtaining.

Conclusions of Law

I.

That the activity here involved, the detonation of experimental nuclear devices, requires the exercise of discretionary functions within the meaning of the term used in Section 2680 of [70] Title 28, United States Code, and sovereign immunity obtains for that reason.

II.

That plaintiff cannot recover on the theory of liability without fault, as such liability is precluded under the Federal Tort Claims Act.

III.

That there was not a taking of the property of the plaintiff for a public use within the meaning of the Fifth Amendment to the Constitution of the United States.

Let Judgment be entered in accordance herewith.

Dated: This 22nd day of December, 1955.

/s/ WM. M. BYRNE,

United States District Judge.

Affidavit of service by mail attached.

Lodged November 28, 1955.

[Endorsed]: Filed December 22, 1955. [71]

United States District Court, Southern District of
California, Central Division

Civil No. 14795-WB

BARTHOLOMAE CORPORATION, a Corpora-
tion, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The Court having previously filed its Findings of Fact and Conclusions of Law herein,

It Is Ordered, Adjudged and Decreed that the plaintiff recover nothing by reason of its complaint

on file herein, and that the defendant have judgment for its costs of suit in the sum of \$175.00.

Dated: This 22nd day of December, 1955.

/s/ WM. M. BYRNE,

United States District Judge.

Lodged November 28, 1955.

[Endorsed]: Filed December 20, 1955.

Docketed and entered December 22, 1955. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Bartholomae Corporation hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment docketed and entered herein on December 22, 1955, that the plaintiff herein recover nothing by reason of its complaint on file herein and that the defendant United States of America have judgment for its costs of suit in the sum of \$175.00.

Dated: This 16th day of February, 1956.

MIZE, KROESE, LARSH &
MIZE,

IRL DAVIS BRETT,

By /s/ IRL DAVIS BRETT,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1956. [74]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The plaintiff-appellant, Bartholomae Corporation, makes the following statement of points upon which it intends to rely upon appeal:

1. The District Court erred in adjudging that the United States was immune from liability for the damage to appellant's property caused by the acts of its agents under Title 28, U.S.C.A., Section 1346(b) upon the ground that such acts were excluded by the provisions of Title 28, U.S.C.A., Section 2680(a).

2. The District Court erred in adjudging that the acts of the agents of the United States did not constitute a taking of an interest in appellant's property for which the United States was liable under the provisions of the Fifth Amendment to the Federal Constitution and of Title 28, U.S.C.A., Section 1346(a).

3. The District Court erred:

(a) In adjudging that appellee was not liable to appellant under the theory of absolute liability pursuant to Title 26, U.S.C.A., Section 1346(a) (2) and Title 28, U.S.C.A., Section 1346(b) [79] by reason of the unique and exceptional circumstances of this case.

(b) In adjudging that appellee was not liable to appellant under the theory of *res ipsa*

loquitur under Title 28, U.S.C.A., Section 1346(b).

4. The District Court erred in refusing to find and adjudge the amount in money to which appellant was entitled from appellee by reason of the injury to appellant's property resulting from the acts of appellee's agents and in refusing to adjudge that appellant recover such sum and its costs from the United States.

Dated: February 27, 1956.

MIZE, KROESE, LARSH &
MIZE, and

IRL DAVIS BRETT,

By /s/ IRL DAVIS BRETT,
Attorneys for
Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 29, 1956. [80]

[Title of District Court and Cause.]

EX PARTE ORDER EXTENDING TIME FOR
FILING THE RECORD ON APPEAL AND
DOCKETING THE APPEAL

(Rule 73(g) F.R.C.P.)

Upon ex parte application of Irl Davis Brett, one of counsel for plaintiff-appellant, and it appearing

to the Court that the notice of appeal was filed herein on February 16, 1956, said plaintiff-appellant ordered a reporter's transcript of the testimony in this cause (omitting all argument except incidental argument in connection with rulings made by the Court in the course of the hearing) from Thomas B. Goodwill, an official court reporter for this Court, but that such reporter has been unable to, and will be unable to, complete the transcript thereof and filing with the clerk of this Court within 40 days from and after February 16, 1956, and it further appearing that plaintiff-appellant has complied with Rule 75(a) F.R.C.P. by serving and filing with the clerk of this Court its designation of the contents of the record on appeal and its statement of points on appeal and that such delay as will be caused by the inability of said court reporter to prepare, transcribe and deliver such reporter's transcript within the 40-day [82] period prescribed by Rule 73(g) F.R.C.P., and good cause appearing therefor;

It Is Ordered that the time for filing the record on appeal and docketing the appeal with the Circuit Court of Appeals for the Ninth Circuit by plaintiff-appellant be and it is hereby extended to and including May 15, 1956.

Dated: March 5, 1956.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed March 5, 1956. [83]

In the United States District Court, Southern
District of California, Central Division
No. 14,795-WB—Civil

BARTHOLOMAE CORPORATION, a Corpora-
tion,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Honorable Wm. M. Byrne, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Appearances:

For the Plaintiff:

MIZE, KROESE, LARSH & MIZE, by
IRL D. BRETT.

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney;
MAX F. DEUTZ,
Assistant United States Attorney,
Chief, Civil Division;
ANDREW J. WEISZ,
Assistant United States Attorney, by
ANDREW J. WEISZ.

Tuesday, May 10, 1955—9:45 A.M.

The Court: The clerk will call the calendar.

The Clerk: No. 14,795-WB Civil, Bartholomae Corporation versus United States of America, for trial.

Mr. Brett: Ready for the plaintiff.

Mr. Weisz: Ready for the defendant.

The Court: You may proceed.

Mr. Brett: If your Honor please, I am aware of the fact that your Honor has lived with this case for some time and has both memoranda and other matters referring to it. Before I present any evidence, it would be helpful if I make just a brief statement of what we expect to prove.

Insofar as causation is concerned, we expect to prove it by a process of elimination, that is, we expect to show that on certain dates the United States, through its agency, the Atomic Energy Commission, detonated certain nuclear weapons at the area in Nevada known as Frenchman's Flat.

There was a very great disturbance in the area of this ranch, which lies about 140 miles north and slightly east of the place at which the detonation took place that violently shook the buildings; that there was in that area no other physical or man-made circumstance from which it could be reasonably determined that such would be the causation; in other words, there was no railroad immediately near, there [6*] were no roads as such that were

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

close enough upon which there could have been any heavy travel, and that there was no earthquake or any other physical disturbance known at that time; and that it was of such nature that in one instance it threw one of the occupants of one of the buildings to the floor, and that it resulted in a severe wrenching of the buildings and caused damages which caused plaster to crack. We will show this by this process:

That prior to these occasions, a witness, Mr. Norwood, who will subsequently testify, was in the area and in the buildings making a very detailed examination of them in connection with prospective improvements which the owner intended to make.

Mr. Norwood is a builder located here in San Marino, in this county, and he had gone over all of the buildings very, very carefully at that time.

That as a part of that examination, as he discovered and as he will be able to testify, there were no such injuries to the buildings, there were no such cracks.

We will show by the depositions of the superintendent who was a resident upon the property, and his wife, who was also a resident upon the property and employed by this plaintiff corporation, that these severe shakings occurred, and that these cracks developed at that time.

Then we will show by Mr. Norwood that he again examined [7] the buildings the following spring and that he was able to discover these cracks, and so forth.

We also will show by the evidence that Mr. Rob-

ert W. Millard, civil engineer, licensed to practice in Nevada, that he was residing on the property from time to time before this occurrence took place, but not at that date, doing certain engineering work and surveying work in that locality, and as such became familiar with the property and the manner in which it was kept up, and that he also examined the property at the time Mr. Norwood did, after the atomic explosions had taken place. He also was present and directed the taking of the photographs which we have and which we will introduce in evidence. And in addition to that, he has carefully charted all of the cracks which have taken place in the various buildings.

We will also introduce a drawing which he has made to scale showing the location of the buildings and the character of them, and so forth.

By Mr. Norwood we will show that these buildings were especially well built, they are something far out of the ordinary, certainly for that locality; and that the buildings have been damaged and divided by virtue of the cracking of the plaster.

We will show through Mr. Millard that he has made a study of official records of the temperatures at the nearest [8] two points to that area, one being directly at the area itself, at which the United States maintained a station, where a station was maintained and from which official records were kept by the United States Weather Bureau, and the other one being nearest to Mr. Millard's home at Ely, Nevada, which is north and east of this property. He had made a chart for some ten-year

period from the time the buildings were built and up through the occasion of these explosions and had made a study of the effects of temperature changes and will state his opinion and the basis for it, as to whether or not what has occurred is a result of temperatures.

Mr. Norwood will testify as to the type and character of building construction and as to whether what has occurred has any relation to that.

We will also offer in evidence, and ask the court to take judicial notice of it, the official report, the 13th semi-annual report of the Atomic Energy Commission, particularly that part thereof which reports the effects of the atomic explosions, and which will be referred to in and annexed to the pretrial memorandum.

We also have another document which was issued by the Atomic Energy Commission which refers to the blast effects and will offer that in evidence, and will ask the court to particularly notice the contents thereof, particularly with reference to blast damage. [9]

We will introduce in evidence a map of the State of Nevada through which we will show the locations of these properties.

We have and we will offer in evidence certified copies of portions of the newspaper reports of the Ely Daily Times, a daily newspaper published nearest to this property, at Ely, Nevada, for the days during which these atomic tests were being made at Frenchman's Flat in October and November, 1951, for the limited purpose of showing what informa-

tion was being given to the public of the fact that there were atomic explosions, not for the text of the newspaper. That is in connection with the depositions of the witnesses Seale, to lay the foundation for their knowledge that there were to be atomic explosions, the reports in this newspaper.

We also will show by portions of the depositions of three Government witnesses, Dr. Alvin Cushman Graves, Dr. Everett Cox and Brigadier General Kenneth E. Fields, that save only for the limited right to determine the time when the explosions were to be given, after making weather tests and other tests, there was no authority vested in any of the persons who were conducting the tests at Frenchman's Flat to change or modify the directions, both as to the amount of nuclear force to be utilized, of the type and character of the test, that is, as to whether it was on the ground or up above, or any other of the details of the operation, save [10] only the matter of the time limit, and that, in that connection, any effects which would be produced therefrom at a distance such as this would be either in the ozonosphere, which lies some 35 miles up above the ground level, or in the ionosphere, which is at an elevation considerably higher, 50 or more miles up in the air, up above the surface; that it would only be the effects in those areas that could travel this distance.

Now, it was anticipated that the explosions which were made would reach those areas and that there was little, if any, information which was known to man as to what would be the results of these explo-

sions reaching those areas; that it was known to be erratic.

The closest form of test which was then known and then practiced was to use testing instruments which were known as microbarographs. If, for any reason, your Honor, I mispronounce some of these matters, it is simply because I don't know any better. At least that is my pronunciation. It is spelled m-i-c-r-o-b-a-r-o-g-r-a-p-h, which are instruments which may be set and which will, through operation of a needle upon paper, much as I take it, as the testing instrument which they use in connection with earthquakes, show the intensity of the force at that particular point.

Now, there were only eight of those instruments available in the United States at that time, according to the testimony [11] of Dr. Cox, and they did not place any instrument toward the north, which is the direction of our property. That upon reading from those instruments, plus tests from air balloons which did not reach these higher areas, they endeavored to arrive at conclusions such as they did arrive at, with respect to weather conditions and when to detonate these nuclear weapons.

I believe that generally outlines the plaintiff's case.

I don't propose at this time to argue our theory of law. I take it that that will be appropriate at a later stage.

I wonder, your Honor, in this particular case, if it would be approved by you, if I did this, that as to one witness, Mr. Millard, that I place him on the

stand first to establish locations and descriptions and then withdraw him so that I can then offer the depositions of persons who were there at those times, and then put him back on the stand. .

The Court: Yes.

Mr. Brett: Mr. Millard, will you take the stand?

ROBERT W. MILLARD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: What is your full name?

The Witness: Robert W. Millard. [12]

(A short intermission followed.)

Mr. Brett: Our delay is simply this, your Honor, that we are examining another map that the Government had, to see whether or not——

The Court: All right.

Mr. Brett: I will ask the clerk to mark this as Plaintiff's Exhibit. Will the plaintiff's designations be by number, your Honor? Is that the practice?

The Court: Yes.

Mr. Brett: Or by letter, which is it?

The Court: By number.

Mr. Brett: I will ask the clerk to mark a certain map here as Exhibit No. 1.

(Said map was marked Plaintiff's Exhibit No. 1 for identification.)

Direct Examination

By Mr. Brett:

Q. Mr. Millard, where do you reside?

(Testimony of Robert W. Millard.)

A. I reside at Ely, Nevada.

Q. And how long have you resided there?

A. I was born in Ely, Nevada. I have lived there all my life.

Q. Are you practicing your profession in that locality?

A. I am practicing the profession of civil engineering.

Q. And you are practicing alone or with someone else? [13]

A. I am practicing in partnership with my father under the name of F. W. Millard & Son, Mining and Civil Engineers.

Q. Is that "Millard," is that the correct pronunciation? A. We pronounce it "Millard."

Q. Now, Mr. Millard, are you licensed to practice the profession of Civil Engineering, by the State of Nevada?

A. Yes, I am a graduate of the University of Nevada. I received my Bachelor of Science in civil engineering. I am licensed by the State of Nevada, holding Professional License No. 217. I am also licensed in the State of Utah. I have a professional engineering license in Utah, No. 1284.

Q. When did you commence the practice of civil engineering in Nevada?

A. I commenced following graduation in June, 1933.

Q. And you have been living in Ely and practicing your profession in and out of Ely and within the State of Nevada ever since that time?

A. With the exception of a period during the

(Testimony of Robert W. Millard.)

war. I left in August of 1941, and was gone until May of 1946, in World War Two.

Q. And has the practice of your profession taken you throughout the State of Nevada?

A. Yes. We practice throughout the State of Nevada and [14] do some work in Utah, and as U.S. mineral surveyers, we work in California.

Q. Now, do you know the location of the property known as the Bartholomae Fish Creek Ranch?

A. Yes. I am very closely associated with that operation, having been their engineer since June of 1946.

Q. During the course of your employment by them and in practice of your profession, have you had occasion to be at the ranch?

A. I have stayed at the ranch a good many days and nights since 1946.

Q. And have you been in all of the various buildings, improvements of the ranch?

A. Yes, I have been in and out of all the buildings. I have lived in two of them for a good many nights and days. I have worked in the Engineering Building and I have taken a great many meals in the cookhouse.

Q. Are you familiar generally with the location of what is known as the Nevada Proving Grounds?

A. Yes, I know the general area of the Nevada Proving Grounds.

Q. And that is sometimes known as Frenchman's Flat and Yucca Flat?

A. Yucca Flat and Frenchman's Flat.

Q. Will you step down here for just a minute,

(Testimony of Robert W. Millard.)

please? [15] I have here a map of the State of Nevada which has been marked by the clerk as Plaintiff's Exhibit No. 1 for identification. Will you put it upon the blackboard, please, with thumbtacks?

A. Yes, sir.

(Said map was attached to the blackboard.)

Mr. Brett: Now, the clerk has supplied me with a red pencil and let us not forget to give it back to him, Mr. Millard.

Q. Now, Mr. Millard, will you examine Plaintiff's Exhibit No. 1 for identification and state whether or not it shows the location of your residence and place of business, Ely, Nevada?

A. Yes. It is an official map as put out by the State Highway Department under the date of 1954. It shows my place of residence at Ely.

Q. Will you put a red arrow there with the figure "1" to show the location of Ely?

A. (The witness wrote the red figure "1" within a circle and drew an arrow lead-line in connection therewith on Exhibit No. 1.)

Q. Now, can you locate the Bartholomae Fish Creek Ranch?

A. It is not so designated or marked on the map. But I can show it here. [16]

Mr. Brett: Mr. Millard, I am a little hard of hearing. I don't know about the court, but if you wouldn't object, I would like to have you speak up a little louder so I can hear you.

Will you designate the location of the Bartholomae Fish Creeek Ranch by a figure "2"?

(Testimony of Robert W. Millard.)

(The witness wrote a red figure "2" within a circle and drew an arrow lead-line in connection therewith on said Exhibit No. 1.)

Q. (By Mr. Brett): Now, can you locate on Exhibit No. 1 for identification the general location of the Nevada Proving Grounds?

(The witness indicates on said map.)

And will you indicate it with the figure "3"?

A. (The witness writes a red figure "3" within a circle and drew an arrow lead-line in connection therewith on said Exhibit No. 1.)

Q. Now, Mr. Millard, what was the nearest mode of public access to the headquarters of the Bartholomae Fish Creek Ranch in 1951?

A. The nearest mode of transportation? Is that your question?

Q. Yes.

A. The nearest mode was the U.S. Highway 50 which is 10 miles north of the Fish Creek [17] Ranch.

Q. Is that disclosed on Plaintiff's Exhibit No. 1 for identification?

A. Yes, U.S. 50 is shown on the exhibit.

Q. And will you indicate that with an arrow and figure "4"?

A. (The witness wrote the red figure "4" within a circle and drew an arrow lead-line in connection therewith on said Exhibit No. 1.)

(Testimony of Robert W. Millard.)

Q. Does U.S. 50 continue easterly and northerly to Ely, Nevada?

A. It continues easterly to Ely.

Q. Now, you have said that is 10 miles north of the headquarters of the Fish Creek Ranch?

A. Yes, that is true. The highway is 10 miles north of the ranch.

Q. And what means are there for reaching such headquarters from U.S. Highway 50?

A. The only means is by county road.

Q. Is that a dirt road?

A. That is a dirt road.

Q. Is that shown upon Plaintiff's Exhibit No. 1, the map?

A. Yes, that is shown.

Q. Sir?

A. Yes, that is shown. [18]

Q. Now, will you indicate that road with the figure "5"?

A. (The witness wrote the red figure "5" within a circle and drew an arrow lead-line in connection therewith on said Exhibit No. 1.)

Mr. Brett: Now, you may resume the witness stand.

(The witness returned to the witness chair.)

Q. Have you prepared a drawing or a chart showing the location and the dimensions, etc., of the improvements at the headquarters of the Bartholomae Fish Creek Ranch?

A. Yes, I have prepared a drawing to scale which shows the buildings at Fish Creek. I believe that is it (indicating document).

(Testimony of Robert W. Millard.)

Q. Will you step down here for just a minute and check it out?

(The witness complies with the request of counsel.)

Mr. Brett: I will ask the clerk to mark this drawing as Plaintiff's Exhibit No. 2 for identification.

(Said document was marked as Plaintiff's Exhibit No. 2 for identification.)

Mr. Brett: Would it be of any assistance to your Honor if you had one before you?

The Court: Well, no.

Mr. Brett: May I inquire, do we have that at an angle where your Honor can see it on the [19] board?

The Court: Yes, I can see it all right.

Mr. Brett: Thank you.

Q. Now, Mr. Millard, you have prepared this for the purpose of this trial?

A. Yes, I prepared this map for the purpose of this trial.

Q. And you prepared it on the site of the property? A. No. I prepared it in Ely.

Q. From notes you had made?

A. From surveys we had made at the ranch.

Q. It is based, then, upon surveys you had made?

A. Yes, sir.

Q. Then, will you generally describe to the court what this drawing illustrates?

(Testimony of Robert W. Millard.)

A. This drawing generally illustrates the entrance road to the headquarters ranch——

Q. Will you point that out?

A. ——which comes in from the south; the dirt road that we spoke of a moment ago, circles around the advanced area of the ranch to the south side of the ranch and then comes into the ranch from the south. This is the general service or access road to the headquarters buildings. It continues on up into the shop area, and so forth.

Q. I will have again to ask you to speak up.

A. Excuse me. The first building that you [20] encounter to your left as you drive in on the gravel access road is what is known as Building No. 2, which is the pumphouse, generator building and pumphouse.

The next building is a building on your right, Building No. 1, which is the foreman's cottage. It has a flagpole area and a circular drive in front of the building.

Q. What did you say this Building No. 1 was?

A. Building No. 1 is the pumphouse and generator building.

The Court: Just a moment. Didn't you refer to that one before as No. 2 and the foreman's house as No. 1?

The Witness: Yes. That is No. 2. Did I misstate it?

The Court: You just said No. 1, now, but that is actually No. 2?

The Witness: That is Building No. 2.

(Testimony of Robert W. Millard.)

Mr. Brett: Well, I have examined the document. I see there is written on it, "Building No. 1 foreman's cottage." A. That is correct.

Q. Will you please proceed from there?

A. The buildings are numbered. The foreman's cottage is Building No. 1. The pumphouse is Building No. 2. The office is Building No. 3. The cookhouse is Building No. 4 and the bunk house is Building No. 5.

As you proceed north on this graveled road, you encounter the buildings, No. 3, the office; No. 4, the cookhouse, and [21] No. 5, the pumphouse and off into the ranch.

Q. (By Mr. Brett): Are the buildings to scale?

A. The buildings are drawn to scale, 1 inch to 10 feet.

Q. And that is an accurate reproduction, then, insofar as location and area of the buildings as they were in the fall of 1951, including October and November of 1951? A. That is true.

Mr. Brett: Now, with your Honor's permission I will withdraw the witness and now offer in evidence and read the depositions of Mr. and Mrs. Seale.

Will you step down, Mr. Millard?

(Witness withdrawn temporarily.)

The Clerk: I have a deposition of Arthur J. Seale. There is no mention of Mrs. Seale.

Mr. Weisz: They should both be in the same envelope.

Mr. Brett: They should both be in the same envelope. I haven't examined the record of the clerk. You do not have one of Mrs. Seale? Is it satisfactory to break this?

The Court: Yes. Break the seal. You may open it.

Mr. Brett: Here they are. The record discloses, your Honor, that in the envelope, the seal of which I have just broken with the court's permission, is a stipulation to take the depositions of Arthur J. Seale and Crystal B. Seale, before C. H. Higer, a notary public in and for the County [22] of Gem, State of Idaho, and the original depositions taken pursuant thereto before Mr. Higer, of Arthur J. Seale, a witness produced on behalf of Bartholomae Corporation, the plaintiff, and I find in this instance, your Honor, that the depositions are divided into two parts; one is the portion which are the direct interrogatories on the part of the plaintiff, and the second portion, before the same notary at the same time and the same witness are the cross-interrogatories by the Government; and then there is also the deposition before the same notary of Mrs. Seale, there being no cross-interrogatories insofar as she is concerned.

Would it be convenient if I would read the questions and ask counsel to take the stand and give the answers? Is that satisfactory?

The Court: Very well. Either way, whichever way you want to do it.

Mr. Brett: I am proceeding first with the direct examination of the witness Arthur J. Seale:

(Whereupon, the deposition of Mr. Arthur J. Seale was read on behalf of the plaintiff, as follows:)

DEPOSITION OF ARTHUR J. SEALE

Direct Examination

“Q. What is your name?

A. Arthur J. Seale.

Q. Where do you now reside?

A. 412 Tenth Avenue North, Nampa, Idaho. [23]

Q. Where did you reside during October and November of 1951?

(Please give the name of the ranch and describe its location.)

A. Fish Creek Ranch, Eureka, Eureka County, Nevada.

Q. By whom were you employed at that time?

A. Bartholomae Corporation.

Q. In what capacity were you employed during those months?

A. Superintendent of the Bartholomae ranches.

Q. When did you first commence your residence at the ‘Fish Creek Ranch’?

“A. July 15, 1951. About that. I went on the payroll the fifteenth. I don’t remember exactly when I moved to the ranch. Went on the payroll the 15th of July, 1951.

Q. Did you reside there continuously thereafter until your employment by Bartholomae Corporation terminated? A. Yes.

Q. When was that? A. July 15, 1952.

(Deposition of Arthur J. Seale.)

Q. What occupation was carried on at the 'Fish Creeek Ranch' during the period in which you were superintendent? [24] A. Raising of cattle.

Q. How many improved buildings were there at the headquarters of the ranch during the period of your residence there?

A. Ten or twelve buildings.

Q. Please describe them briefly as to:

(a) The location of each with reference to the entrance to the ranch headquarters and the center roadway;

(b) Their commonly used names.

A. Go in on the left side of the road. The first building was the light plant and the pumphouse. Next was the office building and our living quarters. Next one was the cook house, and then a bunk house. Next was the saddle room and the next was the saddle horse barn. Next was the warehouse and then the work horse barn off the road and the machine shed, and then the Sara cottage. Then going in again, across the road directly opposite the pumphouse and the light plant was the Bartholomae cottage, and next was the garage, and then another truck garage or machine shed. There is a chicken house across the road from the work-horse barn. Corrals around both barns.

Q. Do you remember two occasions when these buildings were shaken in either October or November of 1951? [25] A. Yes.

Q. What were the dates thereof?

(Deposition of Arthur J. Seale.)

A. I don't know. I don't remember.

Q. Had you received a shipment of cattle just before the first shaking occurred?

A. That is right.

Q. Please describe what happened and where you were when the first shaking occurred?

A. Well, we were bringing cattle up. We had about 200 or 250, I don't know exact number, and we were putting them into the corral for vaccination for Brucellosis and Tuberculosis. Just as we were about to go into the gate the blast went off, and the cattle whirled and ran to the back of the field to the fence, and the fence back there stopped them. Approximately an eighth of a mile, I would say, and we couldn't stop them. Five or six men trying to stop them, but couldn't stop them until they got to the fence."

Mr. Weisz: Your Honor, I will move to strike the answer to that question on the ground it is irrelevant and immaterial and no foundation has been laid.

Mr. Brett: I would like to ask that the court defer ruling on that until I can read Mrs. Seale's deposition. Mrs. Seale was apparently the one that was able to give it. This, I think, is relevant and material as to what occurred. It is [26] true the witness did not say he could fix the time except he knew about the occasion in October and November.

Mr. Weisz: If it meets with the approval of the court, I could make a composite motion after the depositions of the Seales have been read.

(Deposition of Arthur J. Seale.)

The Court: Very well.

(The reading of the deposition of Mr. Arthur J. Seale was resumed as follows:)

“Q. Please describe what happened when the second shaking occurred.

A. Nothing that I know. Just a jar.

Q. Had you had any extremely cold weather up to the time when the last of these shakings occurred?

A. I don't know. I don't remember when it was. I just remember the first one was in late October or November, but the second I don't remember when it was. Seems like the next spring. I don't know exactly when it was. I don't know when the last one occurred. I think it was in the spring, and I think we had, but I am not sure.

Q. What was the lowest temperature up to that time and during that Fall? A. I don't know.

Q. In the course of your duties as superintendent had you observed the conditions of the interiors of the [27] ranch headquarters buildings which you have previously described before they were shaken in the manner you have just described?

A. Yes, with the exception of the Bartholomae cottage.

Q. Had there been an inspection of these buildings as of April, 1951, and if so, by whom?

A. I heard that there had been one, but I wasn't there. I don't know the insurance company. I don't know.”

Mr. Brett: May I explain parenthetically that

(Deposition of Arthur J. Seale.)

you will find in some of these depositions, that counsel not having full information, asked certain questions which, of course, couldn't be answered. In other words, I wasn't aware at that time of the limitations that these parties had, but I think the only thing we can do is proceed with the depositions.

Mr. Weisz: There will be no objection, your Honor, as to inspection.

(The reading of said deposition of Mr. Arthur J. Seale was resumed as follows:)

“Q. What was the condition of the walls and ceilings in the interior of the headquarters buildings of the ranch before such shakings?

A. Well, I presume the office building would be the one they call the headquarters buildings. They were [28] good. The condition was good.

Q. What was the condition of the walls and ceilings thereof after you had returned from the area where the cattle had stampeded and immediately after the shaking?

A. There were cracks in the plaster and in the ceilings.

Q. Did you have any information from any source that the United States was going to conduct atomic bomb tests at its experimental station in Southern Nevada before the occurrence of the shaking and air movement which you have described?

A. Yes, it was in the Ely paper.

Q. What was your information?

A. That they were going to set off a bomb.

(Deposition of Arthur J. Seale.)

Q. What was its source?

A. Frenchman's Flat. That is where they had the atomic tests out of Las Vegas.

Q. Do you know of anything which occurred on the date when the cattle stampeded and on the date of the second shaking, except the atomic explosions by the United States in Southern Nevada, which, in your opinion, could have caused such damage?"

Mr. Weisz: I will object to that question, your Honor, as calling for a conclusion of the witness and calling for [29] expert testimony without a showing that the witness has the requisite background to answer.

Mr. Brett: I think that is a relevant and proper question on that, concerning the nature of it. I think any witness is capable of forming an opinion as to whether there was any factor, to his knowledge, which would cause a thing. That isn't something that would require specialized knowledge.

The Court: What was the stipulation that was entered into at the time of the taking of this deposition, any, in connection with objections?

Mr. Brett: Yes, your Honor. I will read it.

The Court: With respect to objections?

Mr. Weisz: I think the clerk has the stipulation there. It is along at the bottom of the first page and at the top of the second, I believe, your Honor.

The Court: I think it will be sustained.

(The reading of said deposition was continued as follows:)

(Deposition of Arthur J. Seale.)

“Q. Did you meet Mr. John L. Norwood, a general contractor from Los Angeles County, California, when he visited and inspected the Fish Creek Ranch buildings on September 18, 1951?

A. Yes.

Q. Did you inspect and observe the condition of the ranch headquarters buildings during his inspection [30] thereof? A. Yes.

Q. Was there any difference between the condition of the headquarters buildings as they were on the day they were shaken and damaged and just before they were shaken, and the condition thereof when inspected by Mr. Norwood on September 18, 1951?

A. There was a difference after they were shaken, yes.

Q. Do you recall when the headquarters buildings of the Fish Creek Ranch were inspected by Mr. Norwood and by Mr. Robert W. Millard, a civil engineer from Ely, Nevada, on May 30, 1952?

A. Yes.

Q. Did you inspect and observe the condition of said buildings on that day?

A. Yes, I was with them.

Q. Was there any difference between the condition of those buildings right after they were shaken and their condition on May 30, 1952?

A. No, I don't think so.

Q. During the time while you were superintendent at the Fish Creek Ranch was there maintained,

(Deposition of Arthur J. Seale.)

as a part of its regular operations, equipment which recorded weather conditions? [31]

A. Yes.

Q. What matters did it record?

A. The weather conditions; high temperature and low temperature; precipitation.

Q. In the regular course of business were either the originals or copies of such records forwarded to Bartholomae Corporation at its Fullerton, California, office? A. No. Not to my knowledge.

Q. Were such weather records made and so recorded during all of October, 1951? A. Yes.

Q. Do you have any interest in the outcome of this lawsuit? A. No, I don't."

Mr. Brett: Now, I assume that the cross-examination should be offered.

Mr. Weisz: I think so.

Mr. Brett: And also requested by the Government. Unless there is some objection we will proceed in the same manner.

The Court: Yes, you may proceed.

(Whereupon, the cross-interrogatories and answers thereto of the witness Arthur J. Seale were read as follows:)

"Q. How many improved buildings were there on [32] the ranch during the period of October and November of 1951, other than those previously described?

A. I don't think there were. No, that is all.

Q. Please describe them briefly, if any, as to:

(Deposition of Arthur J. Seale.)

a. Type of construction.

b. Location.

c. And commonly used names.

A. They were well constructed buildings. Had slate roof and siding and all plastered.

Q. Were these buildings, if any, shaken, to your knowledge, in either October or November of 1951?

A. Yes.

Q. If so, what were the dates on which they were shaken? A. I don't know.

Q. Did you inspect these buildings prior to October or November of 1951, and what was the date on which you inspected them?

A. Well, I don't remember the dates, but I went over them. I believe with Mr. Norwood. I think he is the guy. So many of them, but I think that that is the guy.

Q. What was their condition at the time of your inspection? A. Good. [33]

Q. Did you inspect those buildings after or during October or November of 1951, and on what dates?

A. After the damage I looked over all of them; shortly after the damage was done; the explosion.

Q. What was the condition of the buildings at that time?

A. The plaster was cracked in most of them; in the office building and then the bunk house and the Bartholomae cottage, and I don't remember too much about the cook house. I think there was a crack or two in there, in it.

(Deposition of Arthur J. Seale.)

Q. What type of equipment was used at Fish Creek Ranch to record weather conditions?

A. It was a government weather rig. I don't know. Had a man there to read it. I never had anything to do with it. It recorded precipitation and cold, etc.

Q. Who took recordings from the equipment during the years 1950 and 1951?

A. Gents Martiletti.

Q. In what capacity was he or she employed?

A. He was the chore man.

Q. Where was the equipment located on the ranch?

A. Between the office building and the cook house.

Q. With regard to the shakings, did you know the cause of such shakings?" [34]

Mr. Weisz: I will object to it. I can't object to my own question.

"A. Well, I figured it was the atomic bomb."

Mr. Weisz: I will move to strike, your Honor, as being unresponsive to the question.

The Court: It may go out.

Mr. Brett: If the court please, I think that is an answer to the question.

The Court: Under no circumstances would such testimony have any probative value. He says he thinks it was the atomic bomb. He is guessing.

"Q. Can you state where the shaking occurred?

A. I suppose all over Nevada."

Mr. Brett: Are you making objection?

(Deposition of Arthur J. Seale.)

Mr. Weisz: No.

“Q. Do you know whether there was shaking within a distance of 100 feet, 500 feet, 1,000 feet, 1,500 feet, or 2,000 feet, and in which direction from the headquarters of the ranch?

A. Yes, in all those distances and all those directions.”

Mr. Brett: Now, I am offering the deposition of Mrs. Seale, whose name is Chrystal B. [35] Seale:

(The plaintiff's witness Mrs. Chrystal B. Seale's deposition was thereupon read as follows.)

DEPOSITION OF CHRYSTAL B. SEALE

Direct Examination

“Q. What is your name?

A. Chrystal B. Seale.

Q. Where do you now reside?

A. 412 Tenth Avenue North, Nampa, Idaho.

Q. Where did you reside during October and November of 1951?

(Please give the name of the Ranch and describe its location.)

A. At Bartholomae Fish Creek Ranch, Eureka, Nevada, out of Eureka.

Q. By whom were you employed at that time?

(Deposition of Chrystal B. Seale.)

A. Bartholomae Corporation.

Q. In what capacity were you employed during those months?

A. I was employed as office clerk and ranch hostess.

Q. When did you first commence your residence at the 'Fish Creek Ranch'?

A. When Mr. Seale took the superintendentship. I believe we arrived at the ranch about 22nd of July, 1951.

Q. Did you reside there continuously thereafter until your employment by Bartholomae Corporation terminated? [36]

A. I did.

Q. When was that?

A. It was on July 15, 1952.

Q. What occupation was carried on at the 'Fish Creek Ranch' during the period in which you were employed?

A. Cattle raising and general ranching, I presume.

Q. How many improved buildings were there at the headquarters of the ranch during the period of your residence there?

A. I would say there were ten or twelve. I don't know exactly.

Q. Please describe them briefly as to: (a) the location of each with reference to the entrance to the ranch headquarters and the center roadway; and (b) their commonly known names.

A. Entering the gateway on the left would be the power house, pump house and so on, and then

(Deposition of Chrystal B. Seale.)

would be the office building, which consisted of our quarters and guest rooms, and then would be the mess hall, cook's quarters, and then would be the bunk house, and next would be a little tack room, and then would be a saddle horse barn, and then—I will start at the entrance again and go down the righthand side. On the righthand side would be the Bartholomae cottage, and then would be a garage, and next would be the machine shop and [37] machine sheds, or some of the machine sheds, and then I believe would be the granary; and then the roadway turns to the right and on the righthand side would be a chicken house and another machine shed, and on the left would be a work horse barn; and then up off the roadway to the right would be what they called Sara Cottage. I believe that is all the buildings that I can name.

Q. Do you remember two occasions when these buildings were shaken in either October or November of 1951? A. Yes.

Q. What were the dates thereof?

A. One was the latter part of October and the other was the first part of November. I am not exactly certain of those dates. For some reason or other I didn't put them down on our daily work report. However, I think the last date was November 5, 1951, I think was the second shaking.

Q. Please describe what happened and where you were when the first shaking occurred.

A. I was in the office building, and well, it was just a shaking something like an earthquake would

(Deposition of Chrystal B. Seale.)

be. Windows rattled and one of the doors swung back and forth. That was about all I noticed [38] then.

Q. Please describe what happened when the second shaking occurred?

A. That was more intense shaking. In fact, I was sorting the ranch laundry and I had just gotten it started and had just reached for a pencil off the desk when the shake came, and I may possibly have been off balance, but I wasn't in a stooped position, but, however, it was intense enough it threw me into the laundry. I was not hurt but just merely unbalanced me that much. At that time I didn't know what it was. I knew that we were going to have the atomic test. I got immediately up and ran out on the porch and looked around, and to the south and southwest, and to the southwest could see the dust mushrooming up over the mountain.

Q. Had you had any extremely cold weather up to the time when the last of these shakings occurred?

A. Not at that time, no. We had much extreme cold weather before spring came, but speaking as of November 5th, no, we had not had any intense cold weather.

Q. What was the lowest temperature up to that time and during that Fall?

A. I can't say offhand.

Q. In the course of your duties as an employee on the ranch had you observed the conditions of the [39] interiors of the ranch headquarters build-

(Deposition of Chrystal B. Seale.)

ings which you have previously described before they were shaken in the manner you have just described?

A. I had been through all the buildings, yes, and saw their conditions.

Q. Had there been an inspection of these buildings as of April, 1951, and if so, by whom?

A. Well, from the insurance and so on must have been carried on them, and knowing Mr. Bartholomae's thoroughness I would say yes, but I don't know of any. I was not at the ranch until after April 1, 1951."

Mr. Brett: Of course, I realize that is hearsay, your Honor. I am not offering that.

Mr. Weisz: There is no objection to it.

Mr. Brett:

"Q. What was the condition of the walls and celings in the interior of the headquarters buildings of the ranch before such shakings?

A. They were very good.

Q. What was the condition of the walls and ceilings thereof immediately after the shaking?

A. There were little hairline cracks started coming, and one place in the office building very close to where I was there was little sifting of plaster powder sifted down immediately after that. However, [40] no chipping or anything like that. Later on there was a small bulging, not too much. Were a lot of cracks.

Q. Did you have any information from any source that the United States was going to conduct

(Deposition of Chrystal B. Seale.)

atomic bomb tests at its experimental station in Southern Nevada before the occurrence of the shaking and air movement which you have described?

A. Well, naturally, we had all read about it in the newspaper, Nevada State Journal and Ely papers.

Q. What was your information?

A. Newspapers.

Q. What was its source?

A. Newspapers.

Q. Do you know of anything which occurred on the dates when the headquarters buildings were shaken as you have described, except the atomic explosions by the United States in Southern Nevada which, in your opinion, could have caused such damage?"

Mr. Weisz: That is the same question previously objected to as to Mr. Seale and I will make the same objection, that it calls for a conclusion of the witness.

The Court: Objection sustained.

Mr. Brett: Your Honor, may we for the record read the answer so we will have the answer in the record? [41]

The Court: Yes.

Mr. Brett: Understanding, of course, that your Honor has ruled. Would you read the answer?

Mr. Weisz: "A. None that I know of."

I might state we did not read into the record the answer of Mr. Seale which was to the same effect.

Mr. Brett: Thank you.

(Deposition of Chrystal B. Seale.)

“Q. Did you meet Mr. John L. Norwood, a general contractor from Los Angeles County, California, when he visited and inspected the Fish Creek Ranch buildings on September 18, 1951?

A. I did.

Q. Did you inspect and observe the condition of the ranch headquarters buildings during his inspection thereof?

A. Other than the cook house and the office building. No, I wasn't with him on his tour of inspection, other than the cook house and office building. I knew their condition.

Q. Was there any difference between the condition of the headquarters buildings as they were on the day they were shaken and damaged and just before they were shaken, and the condition thereof when inspected by Mr. Norwood on September 18, 1951?

A. I would take this had there been any difference [42] between the buildings between the time Mr. Norwood was there and just before the time of the atomic explosion. I would say that before the shock came the buildings were in the same condition they were in at the time Mr. Norwood inspected them on September 18th. However, there were cracks, etc., after they were shaken.

Q. Do you recall when the headquarters buildings of the Fish Creek Ranch were inspected by Mr. Norwood and by Mr. Robert W. Millard, a civil engineer from Ely, Nevada, on May 30, 1952?

A. Yes.

(Deposition of Chrystal B. Seale.)

Q. Did you inspect and observe the condition of said buildings on that day?

A. Yes, I went through them at first with them, but I didn't inspect when the atomic inspector came up and inspected them again. Mr. Seale was with them, but in the morning I did go in with Mr. Bartholomae and Mr. Millard and Mr. Norwood, because Mr. Seale was not at the ranch, and I went in and showed them the cracks, etc., in the buildings, and showed them generally how the cracking was.

Q. Was there any difference between the condition of those buildings right after they were shaken and their condition on May 30, 1952? [43]

A. None, other than that maybe some of the cracks had widened slightly.

Q. Do you have any interest in the outcome of this lawsuit?

A. Absolutely none whatsoever."

The Court: Read the question on which the Court deferred ruling.

Mr. Weisz: What we did, your Honor, I asked to make a general objection which goes to several questions and if I may again state that objection very fully at this point.

The Court: Very well.

Mr. Weisz: I will object to the questions and answers and move to strike them, that is, of Mr. and Mrs. Seale with respect to the shakings.

With regard to Mr. Seale, it is apparent that he did not know when these shakings occurred. As to

him I think it is sure the matter related by him is both immaterial and irrelevant and that no foundation has been laid. There is no connection with this case of the shakings, if there were shakings in the air.

With regard to Mrs. Seale, the question is not so clear. Mrs. Seale states that there was, as best she recalls, a shaking on November 5, 1951, but does not recall the prior shaking. As to November 5th, she apparently was not certain.

I will call the Court's attention to the fact that there [44] was no time of day set when this happened.

The only connection at all with the atomic tests is the testimony of Mrs. Seale that after the second shaking, the November 5th shaking, she went out on the porch and she saw the dust mushrooming. Of course, the word "mushrooming" has a new significance in our language, but I submit that the term does not denote, without further explanation, that characteristic mushrooming of an atomic detonation. Therefore, there is no foundation to connect the shaking with the atomic explosion.

The Court: The motion is denied.

You are referring now to a matter of the question of admissibility. The question as to how much weight is to be given to it is another question. It is not too remote, and therefore it is admissible.

We will take a five-minute recess.

(Recess.)

Mr. Brett: If the Court please, during the re-

cess I have consulted with the Government counsel in reference to the depositions themselves. Of course, the portions that have been admitted in evidence are now in evidence through the reading of them, but as a convenience to the Court, and if the Court will permit, I will offer the depositions as exhibits for identification. So, if it should develop that you should desire to examine them prior to having the record written up, [45] you will have the questions and answers available to you. So I will offer the depositions of Arthur J. Seale, both direct and cross-examination, as Plaintiff's Exhibit No. 3 for identification, and the deposition of Chrystal Seale as Plaintiff's Exhibit No. 4 for identification, and for that limited purpose, it being understood that the offer is made with the knowledge that the text is in the record to the extent permitted by the Court.

The Court: Very well.

(Said depositions were marked as Plaintiff's Exhibits Nos. 3 and 4, respectively, for identification.)

Mr. Brett: I will ask Mr. Millard to resume the stand.

ROBERT W. MILLARD

a witness called by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand, and further testified as follows:

Direct Examination
(Continued)

Mr. Brett: At this time I will offer in evidence the chart which has been marked Exhibit No. 2, for illustrative purposes, to illustrate the witness' testimony.

Mr. Weisz: No objection, your Honor.

The Court: It will be admitted.

(The document previously marked Plaintiff's Exhibit 2 was received in evidence.)

By Mr. Brett:

Q. Now, Mr. Millard, did you personally [46] examine the various improvements at the headquarters of the Bartholomae Fish Creek Ranch in the spring of 1952?

A. Yes, in the spring of 1952.

Q. And was that in May of 1952?

A. May 30th, I believe was the first date of inspection.

Q. And will you state to the Court who were present at the time you made that inspection?

A. I made the inspection in conjunction with——

Q. Sir?

A. I was thinking, Mr. Brett, the first inspection was in conjunction with Mr. Norwood.

(Testimony of Robert W. Millard.)

Q. That is John L. Norwood?

A. John L. Norwood.

Q. And more recently, and in connection with the preparation for the trial of this case did you again inspect the buildings?

A. I inspected the buildings on more than one occasion after the original inspection.

Q. Now, have you prepared to scale a drawing illustrating the location of and the length of various apertures or cracks in the walls or the ceilings of those buildings?

A. Yes, I have. For clarification, Mr. Brett, I inspected again on June 17, 1952. On that occasion I took my father, who is a registered architect, who holds Nevada State Architect's License Number 9, to the Fish Creek Ranch, [47] and together with him, we inspected the buildings for the second time.

Then, just prior to the first date of this trial, and following last fall's earthquake, I again inspected the buildings, and prior to the trial I went to the ranch and prepared a detailed scaled drawing of several of the ranch rooms which I have here for a court exhibit.

Q. Passing the point for a moment, I will ask you this: Was there any change in the character of the walls and ceilings from the time of your first inspection, May 30, 1952, and the last inspection when you made your chart?

A. There was no intensity in the cracking that I could observe. The cracks, to a certain degree,

(Testimony of Robert W. Millard.)

had accumulated a little dirt, but there was no difference that I could observe in the intensity of the cracks.

Q. And did you also, and in the course of that last inspection in making those charts, accompany a photographer and direct the taking of photographs?

A. On one of the inspections I took a certified photographer with me and he photographed certain cracks at my direction.

Q. And while you were present?

A. While I was present there.

Q. What was the name of the photographer?

A. Irwin Fehr. [48]

Q. And where does he have his office?

A. He has a photographic business in Ely, Nevada.

Q. Do you have the chart that you have referred to, here?

A. They are right there on that table.

(The witness produces charts.)

Q. Is there more than one, Mr. Millard?

A. Yes. There are two.

Mr. Brett: I will ask the clerk to mark this next chart which refers to Building No. 1, the Foreman's cottage as Plaintiff's Exhibit No. 5 for identification.

(Said chart was marked as Plaintiff's Exhibit No. 5 for identification.)

Mr. Brett: May I state to the Court that I be-

(Testimony of Robert W. Millard.)

lieve I have disclosed everything that I am using here with the exception of some temperature charts, which I will later reach, to Government's counsel. If I should be inaccurate on that, and if you will direct my attention to it, I will first show you anything for inspection. I think we covered those matters before and I am not taking any time by way of explanation.

The Court: Very well.

Q. (By Mr. Brett): Now, Mr. Millard, will you state to the Court what the drawing, which you have just placed on the board, and which has been marked by the clerk as Plaintiff's Exhibit No. 5 for identification, discloses? [49]

A. This exhibit shows all of the cracks which I was able to find in two identical bedrooms of the foreman's cottage or Building No. 1. The building is shown on the plan here.

Q. That is Exhibit No. 2 you are now pointing to?

A. That is Exhibit No. 2. There is a bedroom in the northeast corner of the cottage. There is an identical bedroom in the southeast corner of the cottage. And I was attempting to find out if there was a general pattern of the cracks and also if temperature was a factor in the cracking of the plaster; then, the bedroom with the greatest temperature change in it should have the greater number of cracks.

These buildings are laid out nearly north and south. The southeast bedroom then having the great-

(Testimony of Robert W. Millard.)

est temperature range would have the greater number of cracks, if temperature were a factor in the cracking of plaster.

The upper drawing that I have shown here is the ceiling of the northeast bedroom, the north wall, the east wall, the south wall and the west wall laid flat for diagram purposes. If you would cut that and pick this up (indicating) this being drawn $\frac{1}{2}$ inch to a foot, this is the arrangement of the northeast bedroom.

This likewise is the identical arrangement of the southeast bedroom.

Q. Then I take it the center portion would be the [50] ceiling?

A. The center portion of each of the rooms so diagrammed is the ceiling, the circle being the light.

Q. Are those diagrams to scale?

A. Those diagrams are to scale, a half-inch to the foot.

Q. And the diagrams of the crackings are to scale?

A. The diagrams of each crack are to scale.

Q. Now, before the month of October, 1951, and specifically before October 22, 1951, had you been in that building?

A. Pardon me, Mr. Brett. May I clarify that last answer of the cracks being to scale.

There is no way of telling the widths of the cracks on such a diagram. To that extent they are not to scale. Some of the cracks are wider than the

(Testimony of Robert W. Millard.)

other cracks. But insofar as the pattern, they are to scale.

Now, will you read the question?

Mr. Brett: Please read the question.

(Pending question read.)

A. Yes, I had been in this building prior to 1951.

Q. Had you examined the walls and the ceilings of the property?

A. No. I had no occasion to examine the walls and ceilings of the buildings.

Q. Had you observed any cracks in the walls and the [51] ceilings of the property at that time?

A. No. I had observed no cracks in this building, there were none in evidence when I was in the building—glaring evidence. I had no reason to examine the building for cracks.

Mr. Brett: Will you take the stand again for a minute. We will come back to that.

(The witness resumes the witness chair.)

Mr. Brett: Counsel has suggested that we might enter into a stipulation as to foundation so I will ask the witness a question on a date.

Q. When were the photographs taken, Mr. Millard?

A. May I get my photographs? They are dated.

Mr. Brett: All right.

Mr. Weisz: Your Honor, as to the photographs, the defense will stipulate that the pictures were

(Testimony of Robert W. Millard.)

properly taken by a competent photographer, they were taken at the place they represent, as well as the camera can, of that which the picture purports to represent and we will waive all foundational questions. The only thing we want is to have very clearly in the record as to the dates when these pictures were taken as representing the property at that particular date.

The Court: Very well.

The Witness: The pictures were taken October 8, 1953.

The Court: Let us have these pictures marked for [52] identification that you are referring to.

Mr. Brett: Now, I will ask the clerk to mark this.

Mr. Weisz: Might I state, that goes for any photographs offered by the plaintiff.

Mr. Brett: Will you mark this photograph as Exhibit No. 6 for identification?

The Court: You can put it right in evidence, in view of the stipulation, if you want to.

Mr. Brett: Well, I want to have the witness to identify it.

The Court: Is that the one he states was taken on that date?

Mr. Brett: All of these were taken on the same date. I will offer it in evidence as Exhibit No. 6, but I want the witness to do some testifying from it.

The Court: It will be received.

(Testimony of Robert W. Millard.)

(The photograph was received in evidence as Plaintiff's Exhibit No. 6.)

Q. (By Mr. Brett): I show you the photograph which has been offered and received in evidence as Exhibit No. 6 and ask you what it portrays?

May I temporarily stand here and make notes until I get through with the photographs?

The Court: Yes.

Mr. Brett: Thank you. [53]

A. Exhibit No. 6 is a general photograph of the ranch building area looking northerly, nearly due north.

Mr. Brett: Will you pass that to His Honor?

Mr. Clerk, will you mark the next photograph as Exhibit No. 7?

(Said photograph was marked Plaintiff's Exhibit No. 7 for identification.)

Mr. Weisz: We will further extend our stipulation, your Honor, to the legends that appear on the backs of the pictures, which will explain to some extent from whence, from what point the pictures were taken, for what value they may have in clarifying the record.

Mr. Brett: That will be appreciated. And I will so stipulate, and I won't have to take the time of the witness on it because it describes it.

The Court: Very well, and it will be received in evidence.

(Testimony of Robert W. Millard.)

Mr. Brett: I offer this photograph Exhibit No. 7 in evidence.

The Clerk: Exhibit No. 7 in evidence.

(The photograph was received as Plaintiff's Exhibit No. 7 in evidence.)

Mr. Brett: And hand it to the court.

Q. The buildings which are referred to in the notes on the backs of these photographs as the Bartholomae cottage, [54] do they refer to photographs of the building which you have illustrated as Building No. 1 or foreman's cottage on Exhibit 2?

A. Yes, foreman's cottage and Bartholomae's cottage, are one and the same building.

Mr. Brett: I offer this photograph, the exterior of the Bartholomae cottage as Exhibit 8.

The Court: It will be received in evidence.

(The photograph was received as Plaintiff's Exhibit No. 8 in evidence.)

Mr. Brett: While this to some extent is a duplicate, I will offer this as Exhibit No. 9, the exterior of the Bartholomae cottage. That is a closer picture.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 9 in evidence.)

Q. (By Mr. Brett): Now, is it correct, Mr. Millard, that some of the photographs were taken at a distance and then a closer picture was taken with the camera so that you were right up against

(Testimony of Robert W. Millard.)

the subject matter? A. Yes, that is true.

Mr. Brett: I offer next as Exhibit No. 10 a photograph of a portion of a wall.

The Court: It will be received.

Mr. Brett: It is the east wall of the southeast bedroom. [55]

(The photograph was received as Plaintiff's Exhibit No. 10 in evidence.)

Q. (By Mr. Brett): Would you show where that is on this last drawing, Mr. Millard, the east wall of the southeast bedroom?

A. Would you like me to show where the picture was——

Q. No. On the drawing, Plaintiff's Exhibit No. 5 for identification?

A. The east wall of the southeast bedroom is this wall (indicating on drawing).

Q. In other words, on this drawing north is at the top and south is at the bottom?

A. And the right-hand is east and the west is the left-hand.

Mr. Brett: I offer as Exhibit No. 11, a photograph, a closeup of the east wall of the southeast bedroom.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 11 in evidence.)

Q. (By Mr. Brett): Will you state to the court the purpose of having that rule in that photo-

(Testimony of Robert W. Millard.)

graph, Mr. Millard?

A. The rule in the photograph was placed there in order to give an idea of dimension against a white wall.

Q. And that particular outline is also shown in your drawing, Exhibit No. 5?

A. Yes, it is shown on that exhibit. [56]

Mr. Brett: As Plaintiff's Exhibit No. 12, I show you a photograph of the east wall of the northeast bedroom.

The Court: That will be received.

(The photograph was received as Plaintiff's Exhibit No. 12 in evidence.)

Mr. Brett: I next offer a closeup of the east wall of the northeast bedroom, as Exhibit No. 13.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 13 in evidence.)

Mr. Brett: May I consult with counsel for just a moment?

The Court: Yes.

(Discussion between counsel off the record.)

Mr. Weisz: The stipulation covers No. 11, including the one following, which is to be Plaintiff's Exhibit 14.

Mr. Brett: I will offer the photograph of the northeast bedroom, the north wall, together with an indication of the force of the cracks and the dimen-

(Testimony of Robert W. Millard.)

sions thereof with reference to a window, which is on the back of the photograph, as Exhibit 14.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 14 in evidence.)

Mr. Brett: I want to ask the witness a question or two about this, your Honor, if I may. May I have it? [57]

Q. Mr. Millard, on the back of Plaintiff's Exhibit No. 14, there are some illustrations giving courses and also distances. Were those made by you?

A. Yes, these were made at the time the photographs were taken.

Q. And are those courses and distances, that is the courses, indicating the directions of the cracks, and the measurements indicating the distances in each direction? A. Yes, they are.

Q. Were those accurate measurements?

A. Yes. They are measured distances.

Q. Taken by you at the location?

A. That is correct.

Mr. Brett: Will you hand that to the court.

As Exhibit No. 15 I offer in evidence photograph of the northeast bedroom ceiling, together with the drawing on the back of it.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 15 in evidence.)

Q. (By Mr. Brett): Now, I ask you, Mr. Mil-

(Testimony of Robert W. Millard.)

lard, with reference to that, is the drawing on the back to measurement and taken at the time of the photographs?

A. Yes, the distances indicated are measured distances.

Q. And indicate the courses and distances of the [58] cracks in the ceiling?

A. Yes, they do.

Mr. Brett: We do not have a closeup here, I note, here of that ceiling photograph.

I believe that concludes all of the photographs with reference to the foreman's building or Bartholomae cottage which is Building No. 1. At this time, and for illustrative purposes, I offer in evidence the drawing which has been marked as Plaintiff's Exhibit No. 5 for identification.

Mr. Weisz: To which I will object, your Honor, on the ground it does not show the condition of the buildings, other than in 1953, and that of such dates, that is immaterial and irrelevant.

Mr. Brett: Well then, I will ask the witness a question:

Q. Mr. Millard, was there any difference between the condition of the foreman's building or Bartholomae cottage No. 1 between May 30, 1952, and the date on which these photographs were taken, insofar as the cracks in the walls and ceilings were concerned?

A. I could observe no difference.

Mr. Weisz: The objection is repeated, your Honor, and other than that, it brings it down to

(Testimony of Robert W. Millard.)

May of 1952.

The Court: The objection is overruled. It will be received.

(The drawing previously marked Plaintiff's Exhibit No. 5 was received in evidence.) [59]

Q. (By Mr. Brett): Now, do you have our drawing, Mr. Millard, of another structure with reference to the cracks?

A. I prepared a second drawing showing the cracks in identical bedrooms in the bunkhouse, which is also on the table there.

Q. Is this drawing that I now show you the drawing you refer to? A. Yes.

Mr. Brett: I ask the clerk to mark this drawing as Plaintiff's Exhibit No. 16 for identification.

The Clerk: No. 16.

(Said drawing was marked as Plaintiff's No. 16 for identification.)

The Court: Are you through with that other one, Mr. Brett?

Mr. Brett: Yes. Well, we may refer to it later. I want to put another on top of it.

The Court: The clerk better mark that. I think that has been received in evidence. You better mark this now, so you keep track of it, the one up there.

The Clerk: It is No. 5, your Honor, isn't it?

The Court: No. 5.

Q. (By Mr. Brett): Mr. Millard, did you prepare the drawing which is now on the blackboard

(Testimony of Robert W. Millard.)

and has been marked as Plaintiff's Exhibit No. 16 for identification? [60] A. Yes, I did.

Q. Is it prepared to scale?

A. It is to scale.

Q. It was prepared in the same manner in its layout, both as to the dimensions of the buildings and in the apertures such as windows, doors, et cetera, and the plane used and the designation of the courses and distances of any cracks in the walls or ceilings that you had heretofore described you used in connection with Plaintiff's Exhibit No. 5?

A. It is the same. This diagram, however, shows three rooms.

Q. Now insofar as directions are concerned, does the same apply to this drawing, north is at the top, or what are the directions on this drawing?

A. This drawing is laid out in accordance with the rooms in the building.

Q. I want to get the compass directions just at the moment. Which is north, south, east and west?

A. Well, the right-hand side is north. This building faces east.

Q. Will you take a red pencil and put an "N" upon Plaintiff's Exhibit 16 for identification showing the compass direction for north?

(The witness writes a red "N" and draws a lead-line in connection therewith on said exhibit.) [61]

Q. Now, will you briefly explain what the various

(Testimony of Robert W. Millard.)

indications are, what the various lines show on this drawing so that the court can identify them?

A. This is the living room and two bedrooms (indicating on said drawing), the two adjacent front bedrooms of Building No. 5 or the men's bunkhouse where the men who work at the ranch live.

This (indicating on said drawing) again is the ceiling of the living room.

These charted lines (indicating on Exhibit 16) represent wood wainscotings that are put on the rooms. The area above the wainscoting is plastered and the ceiling is plastered. The entire ceiling of the living room is plastered.

This (indicating on said drawing) again is the northeast bedroom. This (indicating) is the bedroom directly across the hall from the northeast bedroom, the southeast bedroom of the bunkhouse.

Mr. Brett: Of course, the word "this" wouldn't mean much in the record, but I note, and it is true, is it not, that the drawing itself contains language which describes each building?

A. I believe you are **right**.

Q. Up here, or to the right (indicating) of each particular building, is that true?

A. Of the particular room. [62]

Q. Now, in the course of preparation for this case, were photographs taken in connection with this property?

A. Yes. There were photographs taken of the

(Testimony of Robert W. Millard.)

living room and photographs were taken of both bedrooms.

Mr. Brett: Will you resume the witness stand?

(The witness returns to the witness chair.)

Q. So that we may save time, will you set out from these photographs that I hand to you, the ones that are applicable to the structure which is illustrated by Plaintiff's Exhibit 16?

A. These four photographs are of Building No. 5 (indicating photographs).

Mr. Brett: Please take the others now.

Under the same stipulation with reference to foundation, I am going to offer the next four photographs. As Plaintiff's Exhibit No. 17, a photograph of the east wall and ceiling of the southeast bedroom.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 17 in evidence.)

Mr. Brett: As Plaintiff's Exhibit No. 18, a photograph of the east wall and ceiling of the northeast bedroom.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 18 in evidence.) [63]

Mr. Brett: As Plaintiff's Exhibit No. 19, the east or front room ceiling looking northwesterly.

(Said photograph was marked as Plaintiff's Exhibit No. 19 for identification.)

(Testimony of Robert W. Millard.)

Q. (By Mr. Brett): I will ask you, Mr. Millard, to identify which of the rooms that refers to, before I offer it, referring to your Exhibit 16 for identification.

A. This picture was taken in the living room (indicating on Exhibit 16).

The Court: What number did you say? What is that number?

Mr. Brett: This is No. 19, that we are now looking at.

The Witness: Looking from the lower left toward the upper right on the diagram—correction—it is northwesterly.

Q. (By Mr. Brett): Of the living room in Building No. 5, the bunkhouse?

A. The bunkhouse.

Mr. Brett: We will offer this.

Q. And it is the ceiling, is that correct?

A. The ceiling and west wall—it shows a portion of the west wall.

Q. And a knife is put there to draw attention to——

A. Yes, I placed the knife there in one of the larger cracks.

The Court: It will be received. [64]

(The photograph was received as Plaintiff's Exhibit No. 19 in evidence.)

Mr. Brett: May I explain, your Honor, that this property is a long ways away from here and I haven't been there for some little time, so that is

(Testimony of Robert W. Millard.)

the reason I sometimes have to have my memory refreshed.

Q. Now, as I understand it, Mr. Millard, all of the cracks that are shown on your drawing of May 30, 1952, were on the walls as shown in Exhibit 16 for identification?

A. As far as I know, that is true. They existed the date we made that drawing, which was not May 30th. February 25th.

Q. That is February 25th of this year?

A. That is right.

Q. Now, were any of those cracks there on May 30th of 1952?

A. We closely examined the buildings on May 30th of 1952. However, on that date no diagramming was done.

Q. Well, what is your opinion?

A. My opinion is that these identical cracks were there on May 30th.

Mr. Weisz: Your Honor, I will move to strike that last answer as being the opinion of the witness on a matter as to which his qualification as a licensed civil engineer does not render him an expert. [65]

Mr. Brett: I haven't offered it on the theory as a civil engineer. I think that is a matter of observation. The man has stated he had lived there.

The Court: If it isn't, then, the objection is good. In other words, the only time an opinion is admissible is as an expert's and, of course, if you don't offer it as an expert opinion, then, the ob-

(Testimony of Robert W. Millard.)

jection is good, and the motion will be granted.

Mr. Brett: Well he is an expert. He is a civil engineer and I will offer it on that basis.

The Court: Well, lay a foundation as to why you believe he can make such an estimate and give such an opinion.

Q. (By Mr. Brett): In the course of your experience as a civil engineer, have you constructed buildings?

A. We are engaged in the design and construction of buildings in Nevada, have been for years.

Q. And as I understand it, you were employed as the engineer for this particular property for a period of years? A. That is true.

Q. In the course of your experience have you had occasion to both observe and to make studies of cracks and other disfigurements in buildings and their causes?

A. We have done a great deal of construction work, including plastering. We designed and constructed the City Hall at Ely. We supervised the construction of the high school, [66] of the courthouse, of the jail, of the county hospital, and we have had a lot of experience with plaster.

Q. Were these disfigurements in this bunkhouse building readily visible to the eye?

A. Yes.

Q. And had you been in the bunkhouse on a number of occasions? A. Yes.

Q. And you made a trip at the request of the

(Testimony of Robert W. Millard.)

plaintiff in this case to inspect the buildings on May 30th of 1952? A. I did.

Q. For the purpose of, among other things, examining those buildings and determining to what extent, if any, they had been damaged?

A. To see the extent and the nature of the damage.

Q. And you had occasion at that time to examine the walls and ceilings of this property?

A. Yes.

Q. Now, do you have an opinion as to whether or not the condition that you have described in your chart made in February of 1955, with respect to the cracks in the walls and ceilings was the same as it was when you made your inspection on May 30, 1952?

The Court: Counsel, you are calling for an opinion. Now, his testimony should be as to the facts. He has testified [67] he was there in May, 1952, and he examined them there in May of 1952. That is not a matter of opinion. You are asking him now, was it the same at this time as it was in May, 1952.

Mr. Brett: I will ask him that question.

The Court: He has testified as to a fact. Either it was or it was not.

Q. (By Mr. Brett): Was the condition, when you observed it and made this chart in February, 1955, insofar as the cracks on these walls and ceilings in the bunkhouse were concerned, the same as you observed it when you made the inspection on May 30, 1952?

(Testimony of Robert W. Millard.)

A. It was the same. I could observe no difference between the inspections in May, May 30th—on June 17th following both of the Nevada earthquakes I inspected the buildings, we took pictures on October 8th—and this date in February, when the charts were made, and there was no observed difference in the cracks at that time—on any of those trips.

Q. As I take it, then, the only difference that you have in mind is that you did not measure the cracks or detail them on any drawing at a prior time?

A. That is true, except you will realize that there was some detailing of them at the time the photographs were taken. They were shown on the photographs in October of 1953. The complete detailing was done in February of 1955, as certified on the drawings. [68]

Q. For the purpose of the trial?

A. For the purpose of the trial.

The Court: We will recess until 2:00 p.m.

(Whereupon, a recess was taken until 2:00 p.m. of the same day, Tuesday, May 10, [69] 1955.)

Tuesday, May 10, 1955—2:00 P.M.

Mr. Brett: Before I proceed with the offer of some photographs of other buildings, your Honor, at this time I would like to offer in evidence, for illustrative purposes, Plaintiff's Exhibit No. 16 for identification.

(Testimony of Robert W. Millard.)

Mr. Weisz: The Government will object as previously, as to Exhibit No. 5, your Honor; that it is too remote in time, showing from testimony only to May of 1952.

The Court: The objection is overruled. It isn't offered for the purpose of proving the facts or the condition they are in there. As a matter of fact, his testimony would indicate in some respects they were not——

The Clerk: Shall I mark it in evidence, your Honor?

The Court: It will be received.

(The diagram was received as Plaintiff's Exhibit 16 in evidence.)

ROBERT W. MILLARD

a witness called by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand, and testified further as follows:

Direct Examination

(Continued)

Mr. Brett: Your Honor, I will go to the lectern as soon as I finish with the photographs. I understand that is with your approval. I hate to run back and forth. [70]

The Court: All right.

Mr. Brett: Pursuant to the stipulation we had this morning with reference to the foundation, I will offer as Exhibit No. 20 in evidence a photo-

(Testimony of Robert W. Millard.)

graph of the northwest bedroom, the west wall and ceiling of Building No. 3, together with a drawing on the back of the picture illustrating the course of the cracks in the ceiling.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 20 in evidence.)

Q. (By Mr. Brett): Now, Mr. Millard, when we were referring to Building No. 3 in these photographs, we are referring to the office building which is depicted as Building No. 3 on Plaintiff's Exhibit No. 2 in evidence? A. That is right.

Q. And in each and every instance, whenever there appears diagrams on the backs of these photographs, those diagrams were made by you and made by you with direct reference to the property and at the property? A. That is right.

Mr. Brett: I next offer in evidence as Plaintiff's Exhibit No. 21 a photograph of the east wall and ceiling in the southwest bedroom of Building No. 3, together with the endorsement on the back thereof.

The Court: It will be received. [71]

(The photograph was received as Plaintiff's Exhibit No. 21 in evidence.)

Mr. Brett: I next offer as Exhibit No. 22 in evidence a photograph of the exterior of Building No. 3.

The Court: It will be received.

(Testimony of Robert W. Millard.)

(The photograph was received as Plaintiff's Exhibit No. 22 in evidence.)

Mr. Brett: I next offer as Exhibit No. 23 in evidence a photograph of the plastered ceiling and a portion of the walls of the office in the Administration Building, which is Building No. 3, together with the memorandum on the back thereof.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 23 in evidence.)

Mr. Brett: I next offer as Exhibit No. 24 in evidence a photograph of a ceiling crack east and west over the office desk in the area which was depicted in Exhibit No. 23, and the description on the back thereof.

The Clerk: Plaintiff's Exhibit 24.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 24 in evidence.)

Q. (By Mr. Brett): Now, was there repair in the ceiling when you first examined the property in Building No. 4, the cook house? [72]

A. Yes, there was.

Mr. Brett: I will offer as Plaintiff's Exhibit No. 25 a photograph of the repaired ceiling in Building No. 4.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 25 in evidence.)

(Testimony of Robert W. Millard.)

Mr. Brett: I will offer in evidence as Plaintiff's Exhibit No. 26 another photograph showing the dining room in which the repaired ceiling was located, by showing a view of the dining room in Building No. 4, with the description on the back.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 26 in evidence.)

Mr. Brett: I offer in evidence as Plaintiff's Exhibit No. 27 an exterior view of the front and the south side of Building No. 4.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 27 in evidence.)

Mr. Brett: I will offer as the last photograph of this character, as Plaintiff's Exhibit No. 28, an exterior view of the front and south side of the bunkhouse or Building No. 5.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 28 in evidence.) [73]

Mr. Brett: May I inquire of counsel for a moment, your Honor?

The Court: Yes.

(Colloquy between counsel off the record.)

Q. (By Mr. Brett): I am going to show you a photograph, Mr. Millard, which bears the heading, "Taken April 5, 1954, by Irwin Fehr," and ask you

(Testimony of Robert W. Millard.)

if you know what that photograph refers to and the general location with reference to the areas involved herein?

Mr. Weisz: The stipulation goes to that, too.

Mr. Brett: Oh, I am sorry. Counsel has informed me that the stipulation would go to this photograph, too, and I didn't so understand him, your Honor. Then I will offer as Plaintiff's Exhibit No. 29 in evidence the photograph and the notation on the back, an aerial photograph looking toward the property herein involved. Then I want to ask the witness a few question about it.

The Court: It will be received.

(The photograph was received as Plaintiff's Exhibit No. 29 in evidence.)

Mr. Brett: I am sorry I took the time, in view of counsel's kindness.

The Court: That is all right.

Q. (By Mr. Brett): Now, Mr. Millard, will you state in what direction in that picture the Bartholomae Fish Creek [74] Ranch is located?

A. This picture is looking approximately due south. The Bartholomae Fish Creek Ranch is shown in the central portion of the picture, at the top of the small mountains, which is the Eureka Range. We wanted to get an aerial photograph which would show the terrain between the Fish Creek Ranch and Frenchman's Flat. This was an attempt to show the area southerly from the Fish Creek Ranch.

Mr. Brett: Now, if you will hand that to the

(Testimony of Robert W. Millard.)

court I will get back to the lectern to continue with my examination.

Q. Now, did you make any investigation for the purpose of determining whether or not there were any physical impediments to the course of any blast from the area in which the Atomic Energy Commission initiated tests and known as Frenchman's Flat northerly and toward the Fish Creek Ranch?

Mr. Weisz: I object to that question as assuming at least one fact not in evidence, namely, where the blast took place. Presumably a blast can take place on the ground or in the air. Physical impediment, I presume, would be some sort of physical impediments in a straight line which might well be present as to a ground shot, as they call it, but not as to an aerial shot.

The Court: Objection sustained.

Q. (By Mr. Brett): Did you make an examination, make an investigation to determine the character of the terrain [75] and elevations on a direct line northerly from the Nevada Proving Grounds to the area in which the Bartholomae Fish Creek Ranch is located?

A. Yes, we did. We acquired the only known contour maps which give completed coverage of the area between Frenchman or Yucca Flat and the Bartholomae Ranch, which are the published Aeronautical Charts, and we——

Q. Now, wait just a minute.

You are using the colloquial "we." I want to

(Testimony of Robert W. Millard.)

know, now, are you referring to what you did?

A. I am referring to what I did, yes; referring to the firm as "we," the F. W. Millard & Son.

Q. You are referring to your activities on behalf of the firm, is that right?

A. I am referring to what I did, yes, sir.

Mr. Brett: I will show this to counsel. (Referring to document.)

Mr. Weisz: Your Honor, we will stipulate that the chart, that counsel is bringing forward, is a chart that was used in the ordinary course for aeronautical purposes; that the information contained thereon is correct within the limits of human experience, and that no further foundation may be laid.

Mr. Brett: It is the official instrument issued by the U. S. Coast and Geodetic Survey, so I think it would be admissible as a matter of judicial notice. [76]

The Court: Very Well.

Mr. Brett: I, of course, accept the stipulation.

The Court: You are offering it in evidence?

Mr. Brett: Yes.

The Court: All right, It will be received.

The Clerk: Plaintiff's Exhibit 30.

(Said chart was received as Plaintiff's Exhibit No. 30 in evidence.)

Q. (By Mr. Brett): Now, Mr. Millard, with the use of the information which you obtained on the document which has just been received in evi-

(Testimony of Robert W. Millard.)

dence as Exhibit No. 30, did you plot the elevations between the two points that I mentioned?

A. Yes. I prepared a graph which shows the difference in vertical elevations plotted against the horizontal distance between Frenchman's Flat and Fish Creek Ranch.

Q. Of course, the Nevada Proving Ground is a substantially large area, isn't it?

A. It is a large area.

Q. Would it make any difference in your graph that it is a large area and whatever point in it was the starting test point?

A. Yes, it makes considerable difference. We used the point as shown in the published pamphlet by the A.E.C., which was put out this year, which shows the point at which the certain experiments were conducted at Frenchman's Flat. [77]

Q. That is what you used, then, as your starting point?

A. Yes. It is a little, small booklet. I believe that is it. There are two maps in there. I believe there is one on the back page.

Mr. Brett: Well, I am not going to offer this at the moment. I am going to offer it later. Rather, I am going to identify it so it can be used. Excuse me, counsel. I will find the page. You will want to see that.

(Mr. Brett hands said booklet to Mr. Weisz.)

Mr. Brett: At this time, your Honor, I will ask the clerk to mark this pamphlet which is an official

(Testimony of Robert W. Millard.)

publication of the Atomic Energy Commission, dated January, 1955, and has a yellow cover, for identification as Exhibit No. 31.

The Court: It will be marked for identification.

The Clerk: Exhibit No. 31 for identification.

(Said pamphlet was marked as Plaintiff's Exhibit No. 31 for identification.)

Q. (By Mr. Brett): Now, I will show you Exhibit 31 for identification and will ask you if that document is the document to which you have just previously referred?

A. Yes. That is the document which we used.

Q. Now, on what page of that document is there anything to which you have referred as your starting point within the Proving Ground? [78]

A. On the second page of the document, the page marked "IV," 4, there is map which shows the control point south of Yucca Flat and north of Frenchman's Flat.

On page 37——

Mr. Brett: Pardon me. Just a minute. I want to make a note of that.

Now, you first referred to page 2, and what else was it you said there? It is marked "IV."

A. It is marked "IV," 4, in Roman numerals.

Q. All right.

A. The control point is shown as a square black dot south of Yucca Flat and north of Frenchman's Flat.

Q. All right now, what about page 37?

(Testimony of Robert W. Millard.)

A. On that same map the Las Vegas Bombing and Gunnery Range is outlined as it is on the Aeronautical Chart, which allows you to more or less pinpoint the control point.

Q. Now then, by the "Aeronautical Chart," you are referring to Plaintiff's Exhibit 30 in evidence, the large map?

A. Yes, the large Aeronautical Chart.

Q. All right.

A. Then, on page 37 of this same publication is a vicinity map which shows the Nevada Test Site as such.

Mr. Brett: All right, just lay that down there for the present. I will ask the clerk to mark this drawing as [79] Plaintiff's Exhibit No. 32 for identification.

(Said document was marked as Plaintiff's Exhibit No. 32 for identification.)

Mr. Brett: Will you help me put this up, please, Mr. Millard?

Now, if you will step to one side and use this pointer, Mr. Millard, please. Will you please state to the court just what you have placed on that diagram and what it shows?

A. From the control point as shown in the yellow booklet——

Q. Exhibit 31 for identification.

A. ——to the Fish Creek Ranch buildings, I scribed the line on the Aeronautical charts. It is a pencil line shown on that exhibit——

(Testimony of Robert W. Millard.)

Mr. Brett: It is Exhibit 30 in evidence.

The Witness: —Exhibit 30, and along that pencil line are shown contours, those charts being used by aviators for flying.

This line here (indicating) is a straight line graph taken from the control point to the Fish Creek buildings I examined.

Q. Will you please indicate that with a red pencil and an arrow, and with the letter "A" the line that is the straight line on the graph?

A. (The witness writes a red "A" and draws an arrow [80] lead-line in connection therewith on Exhibit No. 32.)

Q. Now, proceed and identify whatever there is on the drawing so the court may understand it.

A. On the horizontal line I have indicated miles, which are 20, 30, 40, and so forth, right across the drawing, "O" being the approximate control point, and running up to between 160 and 170 miles at the Bartholomae Ranch.

The top profile, an order to show some variation in the vertical range I have exaggerated at 3 to 1. In other words, this vertical increment is three times the horizontal increment. If the horizontal and the vertical increments were the same, this (indicating) would be the graph you would get. This (indicating) is a true graph, a straight-line graph.

Q. By "this" you are referring to the lower of the two lines that run horizontally across the diagram?

A. Right.

(Testimony of Robert W. Millard.)

Q. And the exaggerated scale is the upper of the two, is that correct? A. That is true.

Q. Proceed.

A. I extended the lines both north and south, north of the Fish Creek Ranch into the Eureka Range and south of the control point into the Charleston Range, in order to show some vertical displacement of mountain ranges on the [81] graph.

Q. Now, after making that study and that graph, were you able to draw a conclusion as to what physical impairment or impediment there was as between the two points?

A. We were attempting to determine—I was attempting to determine whether or not there was any mountain range or mountain peak which would act as a deflector or barrier to anything which originated in the Yucca-Frenchman's Flat area, and I found nothing.

Q. That is in the direction north?

A. From the Yucca Flat area north to Fish Creek.

Mr. Brett: Resume the witness stand.

At this time I will offer the graph in evidence as illustrative of the witness' testimony.

Mr. Weisz: I will object thereto, your Honor, on the ground that the graph as merely illustrative of the witness' testimony is irrelevant and immaterial.

The witness has testified, he has fixed the point for us on a map as exhibit for identification. I think the court can see from that map that we have no

(Testimony of Robert W. Millard.)

point at all as a point of beginning. I shall take that on cross-examination and perhaps clarify it.

The Witness has also stated that it would make a considerable difference were the point selected not the proper one. Under those circumstances, it may be illustrative of the witness' testimony, but I still contend that it is both [82] irrelevant and immaterial.

The Court: Well, I don't see the materiality of it.

Mr. Brett: The materiality of it is this, your Honor: That we are endeavoring in every way we can to show the reasons why this court should, and I believe will conclude that injury to these properties arose out of these atomic explosions.

Now, if the Government is in a position to establish that they didn't take place at the control point, that is within their power and not ours. You will see, when we get to the dispositions, that many things that we wanted were of such a character and restricted that we couldn't get them.

Now we have an official publication which tells the people, "Here is where we are conducting the tests." That is what he had and that is what he took as the starting point.

Now, if they did not conduct the tests there, that is for them to show. That goes to the weight and not to the materiality. We have the stipulation that they conducted these various tests there at that place at various times. We have the effects of something. We are trying to establish that they were

(Testimony of Robert W. Millard.)

the result of those tests. One of the things that we are attempting to show to the court is that there wasn't anything to deflect it so that it would not reach that area.

The Court: Counsel, the most that possibly could be [83] said for the exhibit is that it would be a drawing of the testimony of the witness.

Mr. Brett: That is true.

The Court: So that alone, of course, would not make it admissible. In addition to that, of course, he has testified. I assumed that that perhaps was preliminary and that there was other evidence. Frankly, from the present state of the evidence, even considering his testimony that there was nothing between what he has described as the central point and the ranch, there isn't anything to show that that testimony is material. I don't know that it would make any difference if there was a mountain between.

Mr. Brett: It may be true, but I can't prove my case all in one part.

The Court: When and at such time it becomes material, if it ever becomes material, then, of course, it would be admissible, but it certainly isn't admissible now.

Q. (By Mr. Brett): Now, Mr. Millard, did you make a study in order to arrive at certain conclusions with reference to the causation of the cracks which occurred in the buildings which are depicted on plaintiff's Exhibit No. 2 and are the improved

(Testimony of Robert W. Millard.)

buildings on the Bartholomae Fish Creek Ranch headquarters? A. Yes, we did.

Q. Now, I understand that wherever you use the word [84] "we," unless you state to the contrary, you are referring to yourself.

A. That is true.

Q. Will you state what matters you considered in endeavoring to arrive at a conclusion and arriving at a conclusion as to the cause of these cracks?

A. We made several studies. The first was a structural study of the construction of the buildings. That is the reason that in June I took my father up there and we went carefully over the buildings as they were constructed. And we had available to us the blueprints used in the construction of the buildings.

Q. By that do you mean the plans and specifications and blueprints?

A. The plans and specifications as drawn up when the buildings were constructed in 1941. I had secured them from the Fullerton office of the Bartholomae Corporation. Then we made this structural study of the buildings.

We were very anxious to find out if there had been a settlement, a foundation settlement in the buildings. Such a settlement would cause the irregular jagged cracks in the plaster which occurred in the buildings. So, we very carefully first examined all of the foundation structures under the buildings.

We found that the foundations were continuous

(Testimony of Robert W. Millard.)

8-inch [85] concrete walls under all buildings with the exception of the porches.

We used a flashlight to try to find cracks in the concrete foundations. We did find some curing cracks, some small, irregular hairline cracks in the concrete.

There was, however, no settlement of the footings or heavy cracks of the foundations which could have caused the severe cracking of the plaster.

The second thing structurally that we investigated was the type of construction in the buildings. The buildings are very well constructed. The floor joists are 2 by 8's.

The walls are constructed primarily of 2 by 4 studding.

The rafters are 2 by 6's which is especially heavy for that type of building. We have buildings in Ely where 2 by 4 rafters are used. The floor joists, being 2 by 8's, are especially good. A 2 by 6 is normally used in a building of that type in the area with which I am familiar.

We checked through the insulation in the building, the sheeting in the building, the felt used in the construction outside of the sheeting and on top of the subflooring and found that the buildings were well constructed.

Structurally, therefore, the cracks could not have occurred because of deficiency in architectural, structural construction of the buildings.

Q. What other factor did you consider in an endeavor [86] to determine the cause of the cracks?

(Testimony of Robert W. Millard.)

A. The possibility that the cracks were curing cracks. Plaster curing cracks was ruled out, because curing cracks are not of that type. They are more diagonal cracks and, of course, would have appeared years before, the buildings have been constructed in 1941.

So we immediately ruled out the possibility of curing cracks in plaster.

We investigated the possibility of temperature changes causing cracks.

Q. What information did you obtain for that purpose?

A. From the United States Department of Commerce I secured the monthly publications which give the temperature and precipitation ranges at both Fish Creek and Ely. And in order to show graphically the maximum and minimum temperatures that occurred prior to the time of the blast, I have prepared a graph showing those temperatures.

Q. Are both the reports from the Station at Ely and the Station at Fish Creek reported by the Government?

A. Yes, they are reported monthly by the Government.

Q. And both from the Ely area report?

A. What?

Q. From the Ely area report the Government compiles, that is, they report both in the same report?

A. Yes. It is a Nevada publication and both

(Testimony of Robert W. Millard.)

stations' [87] reports are published in that monthly publication.

Mr. Brett: I will ask the clerk to mark this chart as Plaintiff's Exhibit 33.

(Said chart was marked as Plaintiff's Exhibit No. 33 for identification.)

Mr. Brett: I have some thumbtacks here.

(Said graphic chart was placed on the blackboard.)

Q. Now, Mr. Millard, first, is the drawing which has just been placed on the board and which has been marked by the clerk as Plaintiff's Exhibit No. 33 for identification, the graph to which you have just referred?

A. Yes, it is the graph I prepared.

Q. Now, will you state to the court what this graph shows?

Mr. Weisz: Your Honor, I will object to the question on the ground that it is basically hearsay, in that this purports to be a graphic representation of temperatures taken from a Nevada publication, presumably from something from the Department of Commerce of the United States, which presumes information from some other information of an unknown source.

The Court: Overruled. You may describe it.

Mr. Brett: Describe it.

A. I have plotted the maximum temperatures for each month as put out in that Department of Commerce publication; for Ely, using a heavy solid

(Testimony of Robert W. Millard.)

line, and for Fish Creek using [88] a dashed line, and likewise the minimum temperatures each month upon the lower part of the graph, using a solid line for Ely and a dashed line for Fish Creek, plotted against months starting with January, 1941, through their last publication, which was January, 1955.

Q. Is that indicated by months in each year?

A. The years and months are indicated along the lower extremity of the graph.

Q. And in what manner are the temperatures by degrees indicated?

A. They are indicated by markings along the left-hand vertical border of the graph, one inch equaling 10 degrees in temperature.

Q. Now, as a result of your study of the temperature charts and of the graph which you prepared, did you form any conclusions as to whether or not these cracks could have been caused by temperature changes? You can answer that yes or no.

A. Yes.

Q. And what is your opinion?

A. My opinion is that there are far greater ranges of temperature shown by the graph than existed during the winter of 1951-1952, indicating that had the cracks been directly related to temperature, they should have occurred prior to the winter of 1951-52. [89]

Mr. Brett: You may resume the stand.

At this time I will offer in evidence as illustrative of the witness' testimony, Plaintiff's Exhibit 33.

The Court: No objection?

(Testimony of Robert W. Millard.)

Mr. Weisz: I do not desire to tax the court's patience by renewing the previous objection.

The Court: You didn't make a previous objection. The objection that you made was entirely different than an objection to the introduction of the document. You can't object to his describing the document. How is the court going to find out what it is? So your objection was to testimony describing the document, which was not good testimony.

Mr. Weisz: Your Honor, I am objecting to the document, as being a graphic form of hearsay and also being irrelevant and immaterial to the issues in the case.

The Court: Well, the objection is good. If you had present in court and had in evidence the documents from which he prepared this, then it might be admissible for the single purpose of the convenience of the court.

In other words, if it was a resume of matters in evidence, then, it could be presented and would be admissible for that single purpose, but when you don't even have the matters which he has charted in documents, then it is not admissible for any purpose.

Mr. Brett: Well, I am not going to argue with the court. [90] I had assumed the witness would bring them with him, but he tells me he did not. But personally, I think where one has examined a public record of which I think the court can take judicial notice, I think those records we can put in at a later time on judicial notice. I didn't expect

(Testimony of Robert W. Millard.)

the Government would make an objection to a compilation of those reports. I will ask that we file those documents, which I believe we are entitled to, without offering them in evidence. The court takes judicial notice of weather records.

The Court: You don't get the point at all, Mr. Brett. It isn't that. It is something that makes this document admissible in and of itself. Ordinarily this would not be admissible at all——

Mr. Brett: I realize that.

The Court: ——or it is not admissible at all. The only thing is that oftentimes where evidence is of a character that it would take great study, to go through, and we will say, as an illustration, those documents, if he had taken this information from a number of documents and this would simplify it, it might be admitted for that single purpose——quite similar to what we have very often in income tax cases here.

Mr. Brett: Your Honor, I don't want to take your time. I understand that.

The Court (Continuing): Where the accountants prepare [91] a chart. Actually, the chart itself is not admissible unless it is a chart of matters that are in evidence. It is the fact that they are in evidence. So the accountants being experts have prepared that so that the court is not required to go through all those charts singling that out. It is simplified when he has it prepared in summary form.

Mr. Brett: I am sure we can produce them.

(Testimony of Robert W. Millard.)

They will be a great number of pamphlets and I would like to file them in the light of the objection. I don't think there would be any other purpose, because, as you say, this is merely to summarize for convenience a whole set of reports. The reports would cover each month.

The Court: The value of them, if you had them here, would be questionable, so far as that is concerned, assuming that you even had them, but we don't reach that at this point.

Mr. Brett: I want to make it clear to your Honor with regard to understanding, and I do understand you have ruled, and I don't want to argue, but you will appreciate that I can only offer what I have, regardless of what shape it is in. You will appreciate that, having been a lawyer and a judge.

Q. Now, Mr. Millard, as a result of the study you have made of the property itself, the character of the cracks, the reports that were made giving temperatures at Ely and at [92] Fish Creek, over a period of years, from 1941 through 1955, did you draw a conclusion as to whether or not these particular cracks could have been caused by temperature changes? A. Yes, yes, I did.

Q. What is that opinion?

A. These cracks could not have been caused by temperature changes.

Q. Mr. Millard, were there any earthquakes in the area of the Fish Creek Ranch and of Ely during the months of October and November, 1951?

Mr. Weisz: I object to that question, your Honor. If counsel will add "to your knowledge" to that—

(Testimony of Robert W. Millard.)

Q. (By Mr. Brett, continuing): Well, to your knowledge?

The Court: Well, we certainly assume that he wouldn't testify unless he knew.

A. To my knowledge there were no earthquakes during that period.

The Court: Of course, whenever you start using that term, "to my knowledge," that is when you really start getting into trouble. I don't know whether you mean because of your knowledge there were no earthquakes, or that there were no earthquakes that you know about.

A. There were no earthquakes, your Honor, that I knew about during that time.

The Court: All right. [93]

Mr. Brett: I think, your Honor, and I state this sincerely, that arose by virtue of the objection made, that it wasn't in my question, that I did not ask "to your knowledge"; I am not sure.

The Court: Now, the question would be, if he knows whether there were any earthquakes there.

Mr. Brett: That is right.

Q. Mr. Millard, will you state to the court the location of the nearest railroad with respect to the headquarters of the Fish Creek Ranch?

A. The nearest railroad is the Nevada Northern Railroad at Ely, which is approximately 80 miles easterly of the ranch.

Q. At the time, and by the time I refer to months of October and November of 1951, was the area in which was and is located the headquarters

(Testimony of Robert W. Millard.)

of the Fish Creek Ranch within any regular flight line by airplanes?

A. Ely and Eureka are not served by regular airline service. They are initiating this month airline service into Ely, which is the first time Ely has enjoyed such service.

Q. Well, is your answer yes or no to the question?

A. There were no regular airline flights in 1951 and 1952, in that area.

Mr. Brett: That is all with this witness, your Honor.

The Court: We will take our afternoon recess. We will [94] take a five-minute recess.

(Recess.)

Cross-Examination

By Mr. Weisz:

Q. Now, Mr. Millard, when you examined the cracks in the bulidings on May 30, 1952, is it not true that the cracks that you observed at that time were mostly straight-line cracks, that is, they didn't curve out but were in a straight line?

A. They were square-cornered cracks, most of them, yes.

On May 30th I appeared at the Fish Creek Ranch to be with the Government men at that time. I think it was the date that they set, that they wanted to meet at the ranch, and we walked from the cottage over to the bunkhouse and in the front room of the bunkhouse there was one circular crack. Other

(Testimony of Robert W. Millard.)

than that, they were all square cracks, square-cornered cracks.

Q. In other words, the cracks were right-angled? A. Right-angled, yes.

Q. And can you tell us, from your inspection and the structural study that you made where those cracks were in relation to that which was behind the plaster?

A. They were at the joints of the rock wool, rock-lath backing on the studding, as near as we could determine. We [95] did not, however, tear off any plaster, but the general appearance of the cracks indicated that they were along the abutting areas of the rock lath that was on the studding.

Q. Now, your examination of the foundations of these buildings, can you tell us when that took place?

A. That took place on June 17th, following the inspection on May 30th, that next month.

Q. And in inspecting the foundations, you found some curing cracks?

A. Yes; there were some hairline cracks—very, very few. The concrete is very high class. It is a good grade foundation concrete.

Q. And could you describe for the aid of the court what a curing crack is?

A. A curing crack is a light hairline crack that appears—when concrete cures, it shrinks and creates sometimes a hairline crack, which is not a jagged crack but more of a circular crack.

(Testimony of Robert W. Millard.)

Q. Well, is a curing crack, Mr. Millard, necessarily a hairline crack?

A. Most curing cracks are very small. They are not deep-seated, in other words.

Q. Now, the foundations are concrete?

A. The foundations are concrete. [96]

Q. And the walls that you also examined on the various dates were plastered, is that not correct?

A. The buildings are wood frame, plastered inside.

Q. Does the plaster have the same quality in curing, of producing cracks? A. As concrete?

Q. Yes. I mean, is it a similar process?

A. There are certain ingredients in plaster, of course, which are not in concrete, and vice versa; but curing cracks in plaster are similar, I would say, to curing cracks in concrete.

Q. Now, Mr. Millard, is it not true that curing cracks in time, as a general rule, widen?

A. Mr. Weisz, I would say no, that is not true; that curing cracks in building construction occur during the time the material is setting up.

Curing cracks in plaster or concrete occur within two to three to four weeks after construction.

A curing crack in plaster occurs from the corner of a window or a door and runs at 45 degrees from it. That is my interpretation of a curing crack.

Q. Does plaster have a coefficient of expansion, that is, does it contract and expand with a change of temperature?

(Testimony of Robert W. Millard.)

A. No. Plaster, as such, has no ingredient which has a tendency to contract or expand.

Q. Does a plastered wall such as used by the Bartholomae [97] Fish Creek Ranch buildings expand or contract with changes in temperatures?

A. The wood frame back of the plaster expands and contracts with change in temperature.

Q. But the plaster itself does not?

A. Plaster itself has no ingredient to expand or contract as such.

Q. Now, the rock lath which you mentioned which is behind the plaster, is that not also plaster?

A. Yes, it has a base of plaster of Paris. It is called button board or rock lath.

Q. Well, is the plaster of Paris or rock lath different from the plaster, that is, the finishing plaster that is placed over it?

A. No. There is plaster of Paris in the finished coat of a plaster job, but basically button board is plaster of Paris.

Q. As a civil engineer, sir, do you not have occasion to use various handbooks and in particular the handbook of the American Institute of Steel Construction? A. That is right.

Q. And if I state to you that the American Handbook of Steel Construction at page 348 had a table headed, "Expansion of Bodies by Heat," and showed you on the table that a material described as plaster has a coefficient of expansion, [98] what would you say?

A. Well, that is true. All materials do.

(Testimony of Robert W. Millard.)

We are talking in a practical sense. The thing that expands in a building is the wood framing, not the "plaster." Theoretically, it certainly has a base for expansion, but not from a practical standpoint.

Q. Oh, I am sorry. I misunderstood that. Now, is plaster subject to what we may call a fatigue factor, sir? A. Yes.

Q. And could the expansion and contraction produced by temperature change either directly, through the expansion and contraction of the plaster or the stresses and strains produced by the expansion and contraction of the wood framing produce fatigue in plaster?

A. There are reports of what they call thermal shock which I think you are referring to, due to expansion and contraction of wood framing.

Q. Well, can you tell us, sir, whether in the Fish Creek area of Nevada they had wide ranges of temperature within a 24-hour period as compared, let us say, with Southern California?

Mr. Brett: I object to that as irrelevant and also as immaterial, in that it is taking in an area which seems to me is too large as to have any materiality in this case, what might take place throughout the State of Nevada as [99] compared to what might take place in Southern California.

The Court: What is the purpose of this, counsel?

Mr. Weisz: Well, your Honor, we have just gone over the possibility of either a fatigue factor or what the witness has described as thermal shock. And that is proper, I will point out, for cross-

(Testimony of Robert W. Millard.)

examination, where the witness has given an opinion.

I am seeking to find out whether there may be other factors involved which might be considered, which would have a tendency to produce cracks in plaster.

The Court: All right. The objection is overruled.

The Witness: Your Honor, may I have the question, please?

(Pending question read.)

A. The temperature range, with the slight amount of knowledge, of course, that I have of Southern California, is greater than Los Angeles, let us say.

Mr. Weisz: Thank you. I have no further questions.

Mr. Brett: I have no further questions.

The Court: Mr. Millard, when was the first time you ever examined or ever saw the inside of the structures there at the Bartholomae Ranch?

The Witness: In June, 1946, your Honor.

The Court: And when was the first time subsequent to October, 1951? In other words, the first time after October, [100] 1951, at the time that the damage is alleged to have occurred?

A. It was in May, on May 30th of 1952.

The Court: And how many times have you observed it since then? Roughly? Several times?

The Witness: I would say approximately six.

(Testimony of Robert W. Millard.)

The Court: Some in 1953?

The Witness: Yes.

The Court: Some in 1954?

The Witness: Yes.

The Court: And in 1955?

The Witness: Yes, sir.

In 1954, for your information, we had two earthquakes in the Fallon area of Nevada, one in July and one in December. Immediately following both of those earthquakes I went to the ranch with a set of photographs which have been admitted as evidence and compared directly on the walls the photographs with the existing cracks, to determine whether the earthquakes had any effect upon the widening or expansion of the cracking.

The Court: What did you learn?

The Witness: I found that I couldn't observe any difference before and after the earthquakes, the photographs, of course, having been taken before the earthquakes.

The Court: Have you ever observed any differences as to the time you examined the cracks in the spring of 1952, [101] have you noticed any difference in the extent of the cracks, then, and the last time you saw them in 1955?

A. I have been unable to find any difference.

In June, on June 17th, when my father and I went out there, we made many sketches in our notebook and from that time on, on my various trips, I have been unable to find any difference in the extent or the intensity of the cracks.

(Testimony of Robert W. Millard.)

The Court: Then, you would say that if that damage was caused by the detonation of atomic bombs in 1951, the atomic bombs that have been detonated since then have not in any way caused any damage?

The Witness: No, sir. I haven't been to the ranch during the current series, but prior to that there was no damage, no additional damage from the atomic bombs.

The Court: That is all.

Mr. Brett: That is all.

(Witness excused.)

Mr. Brett: I will call Mr. John L. Norwood as the plaintiff's next witness.

JOHN L. NORWOOD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Your full name, please?

The Witness: John L. Norwood.

Mr. Brett: Before proceeding with this [102] witness' testimony, your Honor, it is my understanding that Government counsel and plaintiff's counsel can enter into a stipulation. You have indicated what you would stipulate to. I would appreciate it if you would state it.

Mr. Weisz: Yes.

Your Honor, counsel agree to stipulate that as of the series in the fall of 1951, the atomic detonation series, the newspapers and other communications media carried news of that fact, and that the

(Testimony of John L. Norwood.)

dates of the detonations were known beforehand as a matter of general knowledge, to almost all persons in the area of Nevada with which we are concerned here, this brief area; that it was a matter of common knowledge of all persons within that area that the detonations were to take place on the dates that they did take place, during the fall series of 1951.

Mr. Brett: We accept that stipulation.

The Court: Very well.

Direct Examination

By Mr. Brett:

Q. Mr. Norwood, where do you reside?

A. At 924 South Orange Grove, Pasadena.

Q. What is your occupation?

A. Building contractor.

Q. Do you have a firm?

A. I am in partnership with John W. DeLonge.
Our firm [103] name is Norwood and DeLonge.

Q. Where is your office?

A. 1441 San Marino Avenue, San Marino.

Q. How long have you been engaged in the business of building contracting?

A. I have been a licensed contractor twelve years. I have been in the building business for twenty-two years.

Q. And when you state that you have been a licensed contractor, you mean licensed by what?

A. The State of California. Prior to that I was working for others. Prior to that period I was in

(Testimony of John L. Norwood.)

the building work, but working for other contractors.

Q. What types of structures have you built?

A. Well, we do residential, commercial; mostly residential, I would say, probably 75 per cent of it is residential, small and large, apartment houses and repairs, remodeling.

Q. Now, are you familiar with the property in the State of Nevada which is known as the Bartholomae Fish Creek Ranch? A. I am.

Q. How long have you been familiar with it?

A. My first trip to this ranch was on September 8, 1951.

Q. September 8th? [104] A. Yes, sir.

Q. And how did you happen to go there at that time?

A. I was asked by Mr. Bartholomae to go up there and familiarize myself with the construction and the work; they were anticipating some construction up there and he wanted me to see the layout and see what had to be done, and get the layout, general layout of the ranch.

Q. Now, in the course of carrying on that duty, did you go to the headquarters? A. Yes, I did.

Q. Did you have with you plans and specifications of the buildings?

A. No, I did not, not the first trip.

Q. And did you make any inspection of the buildings? A. Yes, I did.

Q. To what extent did you inspect the buildings?

A. Well, I went through each building in the

(Testimony of John L. Norwood.)

main Fish Creek Ranch. I was by myself most of the time. I crawled under the buildings, to see what the foundations were; I crawled into one of the attics to see what the construction was. I went through all of the rooms and went through the barns, the chicken houses, everything.

Q. Did you examine the walls and ceilings of each of these buildings?

A. Yes, I did. [105]

Q. In detail? A. Yes.

Q. And subsequent to that trip there, did you also have made accessible to you the plans and specifications of the buildings? A. Yes, I did.

Q. And you have studied them? A. Yes.

Q. Will you describe to the court the buildings which are depicted on Plaintiff's Exhibit No. 2, as Buildings Nos. 1 through 5, inclusive, stating the nature and character of the construction as you found it as a result of your inspection?

And, Mr. Norwood, will you please, in order to save the time of the court, so that we can go along, while you are describing it, compare it with other construction which is generally in use, both in the Nevada area and here, according to your knowledge?

A. I have been through, of course, all of the buildings that are on here (indicating on Exhibit 2); this foreman's cottage, No. 1, and the cook-house and the bunkhouse are basically all of the same type of construction. The interior is practically all plaster, inside of them.

(Testimony of John L. Norwood.)

The other buildings generally have the same framing, the same type of lumber and so forth, but there is no plaster [106] in the other buildings.

The exterior is the same on practically all of them. Basically, these four buildings here (indicating on said exhibit) have a concrete foundation that goes down into the earth $2\frac{1}{2}$ to 3 feet, with an 8-inch wall. Normally that is 6 inches in Nevada as well as in California. So the foundations are about 25 per cent heavier than you will find in practically any other buildings in the Nevada area, under one-story buildings.

It has no interior piers underneath the buildings. Instead of piers they have what they call a continuous foundation footing. It is almost the same foundation that is used on the outside of the building. It is considered much better construction and there is less chance of settlement.

The floor joists are 2 by 8's—normally, they are 2 by 6's—which gives you a 25 per cent heavier floor, stronger floor.

The floor joists are covered. These floor joists were covered with a 1 by 8 shiplap; on top of that was a 15-pound felt building paper and on top of that was a 15/16 maple flooring.

The walls are constructed of 2 by 4's, 16 inches on center, which is a normal construction. On the outside of that, they had 1 by 8 solid sheathing, which is a little better than usual. Above that was a 15-pound felt and [107] asbestos shingles.

(Testimony of John L. Norwood.)

In between all these studs were boards made from 4-inch rock wool batts.

The exterior plaster was $\frac{3}{8}$ job lath and plaster.

The ceiling joists were 2 by 6's. Normally on rooms, the size of these buildings, 2 by 4's are used. In observing the lumber in the jobs, I saw no No. 2 or No. 3 lumber; it was all No. 1 lumber.

The roof rafters were 2 by 6's, 24-inch on center. Normally, that is 2 by 4.

The struts under the roof rafters were 2 by 4's, 24 inches on center. I have never seen that done before. Normally they are 6 to 8 feet on center. All these buildings are 24-inch on center. They have a collar tie on every rafter, which I have never seen before, even in Minnesota and in the Eastern States where they have lots of snow, and so that was unusual, and I noted that.

Above that, they have a solid sheathing and 30-pound felt and asbestos shingles.

The ceiling was also entirely insulated with 4-inch batts of wool.

Everything looked unusually good as far as construction went. There were plenty of nails and everything was straight and plumb.

In the barns, which can be observed because there is [108] no plaster on them, you can see that bolts were used instead of nails, where nails are commonly used, and things like that.

Of course, in the house where things are plastered over, it is difficult to see some of those items without tearing off the plaster.

(Testimony of John L. Norwood.)

Generally, that is about the construction, and I would say that it is about 50 per cent better than anything that I have seen in Southern California or in the Nevada areas, in Las Vegas and Ely buildings.

Mr. Brett: Now, you may resume the witness stand.

When you examined those buildings, on September 8, 1951, did you find any cracks in the walls or the ceilings of the buildings which had been plastered? A. Yes, I did.

Q. And where did you find them?

A. I only observed one area that had cracked and that was in the messhall ceiling. It had been repaired, but I did note it.

Q. Except for that one place, did you find that there were any observable cracks in either the walls or the ceilings of those buildings?

A. I saw no other cracks anywhere.

Q. Now, did you go back to the property on the 30th day of May of 1952? A. I did. [109]

Q. And at that time you met other people?

A. Yes.

Q. Whom did you meet there?

A. Mr. Millard was there; a man, I believe his name was Hall, from the Atomic Adjustment Bureau, I believe, and there was an engineer there by the name of Bruno or Bruner; Bruner, I believe it was. He was from Las Vegas, I believe.

Q. Was Mr. Bartholomae there?

A. Mr. Bartholomae was there. Mr. Seale, the

(Testimony of John L. Norwood.)

ranch foreman, was there, and I believe that was the extent of those present.

Q. And was Mr. Mize there?

A. There was a Mr. Mize there, yes.

Q. An attorney for Mr. Bartholomae?

A. An attorney.

Q. Now, did you inspect those buildings at that time? A. Yes, I did.

Q. In the interior? A. Yes, sir.

Q. Did you find any difference in the interior of those buildings at the time you inspected them on May 30, 1952, from the condition in which you had observed them when you were there and inspected them on September 8, 1951?

A. Yes, I did.

Q. Will you state to the court what differences you [110] observed?

A. The walls in all the plastered buildings, and ceilings—not all the walls, but many of them—were cracked, with quite large and wide cracks.

Q. Will you state the character of the cracks, that is, whether it was a straight line, in a broken line, or how would you describe them?

A. Well, there was some of each type. Most of them were zig-zagging cracks following the plaster lath. A lath that is nailed onto the studs is 48 inches long and 16 inches wide and $\frac{3}{8}$ -inch thick, and the cracks would go along for maybe two or three lengths of lath and then zigzagged across 16 inches, and then across again. Most of the bad cracks would take that course and follow the lath line. There

(Testimony of John L. Norwood.)

were a few cracks underneath the windows, and most of the cracks had an appearance of something twisting—well, as I told Mr. Bartholomae—

The Court: No, no. Don't tell us what you told Mr. Bartholomae.

The Witness: All right.

The Court: You just tell us as to the facts.

A. It appeared to me something had hit the corner of the building, just like a large truck or something had run into each one of those buildings on the same side, and the cracks not only were open but there was a little sort of [111] a twisting look to them. I can show it on the blackboard better than I could describe it.

Q. (By Mr. Brett): Now, you have erected a number of buildings in this locality?

A. Yes, sir, I have.

Q. Buildings which run into considerable money? A. Yes.

Q. And have you also erected buildings in colder climates, in Minnesota or elsewhere?

A. I have designed buildings and supervised buildings in both Minnesota and Chicago. I have not built any there.

Q. Did you examine the foundations of these buildings during your inspection of May, 1952?

A. Yes, I did.

Q. You had examined the foundations during your inspection in September of 1951?

A. I did.

Q. And did you find any changes in the founda-

(Testimony of John L. Norwood.)

tions, in your later examination? A. None.

Q. You are familiar in the course of your work with settlement cracks in foundations, are you?

A. Yes, I am.

Q. And will you describe to the court the general character of settlement cracks in foundations, in buildings [112] of this kind?

A. As to settlement cracks, in buildings of this size, the concrete will actually break and leave a rough joint. Normally there will be a sheering effect. One part of the wall will actually drop below the other. And, normally, it is further apart at the top of the foundation than it is at the base of the foundation, too.

Q. Did you find any settlement cracks in any of the foundations, when you inspected the property May 30th of 1952? A. None.

Q. Did you make any inspection of any other factors, for the purpose of determining whether there had been a settlement in any of the buildings?

A. Well, I checked all of the foundations on my second inspection, to see if there were cracks. I found no settlement or anything at all that would indicate that the foundations had settled.

Q. As a result of your inspections, have you formed a conclusion as to whether or not the cracks which you observed could have been caused by settlement of any of the buildings?

A. They definitely could not have been caused by settlement.

Q. Now, are you familiar with what are known

(Testimony of John L. Norwood.)

in the [113] building trade as curing cracks in works of construction, in buildings?

A. Yes, I am.

Q. What are those kinds of cracks? What does that mean?

A. Well, if plaster dries too fast, or if there is too much—normally, if a wind comes up blowing through the windows and the plaster will check, they are very small air checks. And there will generally be spots of them over a wall, and normally those checks are not over 2 or 3 inches long, but there will be quite a number of them on a wall that gets quite a bit of wind or if the plaster takes too long to dry.

Sometimes, if the plaster is put on in wet weather and the plaster stays wet too long, the board gets soaked up and it soaks into the lumber and it will cause the lumber to swell and also cause a curing check. Around windows and doors, it is diagonal, it runs up at 45 degrees from the corner of doors, normally, or windows, and it is about the width of a pencil line and generally runs off a foot from the corner.

Q. In the construction of the character which you found at the headquarters of the Bartholomae Fish Creek Ranch, what, in your opinion, would be the time after the construction, that is, from the time of completion of the job, within which settlement cracks would occur? [114]

A. Well, normally, if you have any settlement cracks, you get them within one year.

(Testimony of John L. Norwood.)

Q. Do you know when these buildings were erected?

A. I have heard 1941. I am not sure of that.

Q. Did you form an opinion as to whether or not the cracks in the walls and in the ceilings, which you observed during your inspection on May 30, 1952, could have been caused by settlement—or by curing?

A. They definitely could not have been. The buildings had the appearance of being 5 or 6 years old, at least, and I saw no curing cracks. As a matter of fact, as I stated before, I only saw one crack on my first inspection and that had been repaired in the messhall.

Plaster repaired cracks normally show, even though they have been painted over, or repaired. It is pretty hard to get rid of them.

Q. Do you have an opinion as to whether or not the cracks which you observed during your inspection of May 30, 1952, could have been the result of temperature changes over in the area?

The Witness: No. The——

Q. (By Mr. Brett): Do you have an opinion, is the question.

A. That type of temperature changes did not make that kind of a crack, in my opinion. [115]

Q. I take it that you do have an opinion and you have stated it, is that correct? A. Yes.

Q. Will you state your reasons for that opinion?

A. Well, the pattern of the cracks on the ceilings and in the walls show that the building was moved

(Testimony of John L. Norwood.)

by some external force, from the direction of those cracks and from the way that they were twisted and the way the plaster would twist up with the crack.

And, of course, cold weather does not affect plaster. The sudden temperature changes could crack it, but not real cold weather or real hot weather. It is not affected by either one of them.

Q. Now, Mr. Norwood, we have some pictures in evidence. You have seen those photographs?

A. I have seen some of them, yes.

Q. Will you tell me, whether in your opinion, based upon your inspection, there was a substantial defacement of the property, as the result of these cracks? A. Yes, there was.

Q. Have you prepared an estimate as to the cost of repairing those buildings, to restore those interiors to the condition in which they were as you saw them on September 8, 1951?

A. I have prepared a cost estimate, yes. [116]

Q. And will you state what, in your opinion, the reasonable cost of restoration of those buildings, by repairing the plaster and the ceilings, would be as of the date, that is the fall of 1951, to restore them to the condition in which you observed them on September 8, 1951?

A. Well, my estimate which was in September—which was after observing them May 30, 1952, in my bid, which was dated in July, 1952, is for approximately \$5,000.

Q. In your opinion, is that a reasonable cost of

(Testimony of John L. Norwood.)

doing that work at that location, and as of the fall of 1951? A. It is.

Mr. Brett: That is all with this witness.

Cross-Examination

By Mr. Weisz:

Q. Mr. Norwood, did you state that sudden temperature changes can crack plaster?

A. They could, yes.

Q. Now, when you went to the ranch in September of 1951, you were inspecting the buildings for what purpose, sir? A. In 1951?

Q. In 1951, yes, at the first visit?

A. To construct other buildings on the ranch.

Q. In other words, to get the layout of the buildings so they could be duplicated and keep the harmony of the place? A. Right. [117]

Q. And you inspected the walls and the ceilings on the interiors of the other buildings in order to duplicate them in new construction, is that correct?

A. Right.

Q. You were not inspecting for cracks, were you, sir?

A. No. I was inspecting them for workmanship.

Q. Now, Mr. Norwood, you have worked with and have been familiar with work in plaster for some period of time, have you not?

A. Yes, sir.

Q. Is it fair to say, Mr. Norwood, that there is no such thing as a plaster wall without cracks?

A. Yes. It is fair. No. In other words, when we

(Testimony of John L. Norwood.)

build we are very much ashamed when we build a building and we get a crack in it, and it is very unusual when we do get a crack.

Q. Isn't it true, Mr. Norwood, that plaster walls normally, usually, in any area, develop very thin cracks?

A. Occasionally, yes, but not in good construction.

Q. Now, you made an estimate of repair in July of 1952, as to the buildings here, with regard to the cracks, for repair of the cracks? A. Yes.

Q. And was that for pulling off the plaster and replastering the walls, or repairing the plaster that was on the walls? [118]

A. Well, there is no way of repairing the plaster without tearing it off and having it back in its original condition. So I offered something that would be more reasonable or as reasonable and as a substitute. In other words, it would not give them what they had before, but it would be a substitute.

Q. And what was that, sir?

A. To cover the walls in the rooms that were cracked with knotty pine boarding and paint them; paint them and cover the ceilings with a Celotex, acoustical plaster—acoustical board, and it would be put in Mastic on the ceilings and it would cover all the cracks.

In some rooms, for instance, where there were cracks just at the windows, I had just figured on a wainscoting of wood similar to this room here, in knotty pine.

(Testimony of John L. Norwood.)

In other words, that would be about as reasonable a way as you could repair them.

Q. Now, that repaired crack in the messhall that you spoke of, how had that been repaired?

A. It had been filled with probably spackle and painted. It was a straight crack that went, oh, maybe 8 or 9 feet to almost the center of the ceiling and did not zigzag or anything. It was just a straight crack. And it didn't have the appearance of too wide a crack, and it has been filled and enameled over. [119]

The messhall was all enameled on the ceiling and part of the walls down to a wainscoting. It had wood wainscoting in it.

Q. Now, isn't it common practice to repair cracks by either spackling or using Swedish putty to fill the cracks and then size and paint them?

A. Well, it is done, many, many times, because it is the most reasonable way of doing it, but it always shows. We have repair, remodel jobs, where we have that situation, and where they don't want to spend the money to fix it properly, and the next best thing is to patch-spackle the crack, sandpaper it down, smooth it, and cover the ceiling with Sanitas, or the wall, or whatever it is. That is getting up to almost as expensive as putting some wood over it, and then it might work loose. Once you have a crack, it will always work a little bit. That crack can work, because there is no strength there. And if it does work, your Sanitas will buckle and then cause the trouble again.

(Testimony of John L. Norwood.)

Q. Isn't it true that plaster does not have any intrinsic strength?

A. Well, it has some strength, but different plasters, some plasters have more strength than others and some have more give than others.

Q. Well, for instance, on buttonboard and rock lath, there is always a paper backing on that, isn't there? [120] A. Yes.

Q. And isn't it the paper that gives the board sheer strength, that is, against sheering and cracking?

A. The paper is the adhesive that the plaster sticks to and soaks up and the board gives it most of the strength. The plaster has some strength. You can take plaster that is dumped out of a cement mixer and pick it up and it takes quite a bit of strength to break it. It has some strength in it.

Q. Could you tell us again what the estimate was that you made in July of 1952?

A. Well, I gave two estimates. I gave one estimate for \$3,937.03, which was for the lumber or the labor and material for work on the job. Then, in addition to that, I had another estimate, and I have it here, for the subsistence pay for the men, their room and board while they were there.

The job is located approximately 25 miles out of town. Whenever we have any work that far out of town, we have to be paid for that. Then, also, the men have to have travel pay, and I put that in the cost.

Q. And what did that amount to, sir, in dollars?

(Testimony of John L. Norwood.)

A. That amounted to \$1,030.50.

Q. And that was figuring labor from where, from Ely, Nevada?

A. No. That was using my own men from here; in other words, that I would have to pay their time on the road [121] plus their transportation, plus their subsistence, which is \$5.00 per day per man.

Mr. Weisz: All right. Nothing further.

The Witness (Continuing): Which is the recognized union rate. That is the recognized union rate.

Mr. Weisz: No further questions.

The Court: You may step down.

The Witness: Thank you.

Mr. Brett: Now, at this time, if the court please, I will offer into evidence, and as a matter of judicial notice, that part of the official report of the Atomic Energy Commission, which is the 13th semi-annual report and is entitled, "Assuring Public Safety in Continental Weapons Tests," and I refer to that portion of it which is on pages 77 through 89 under the heading of "Public Safety in Continental Weapons Tests." There was a copy annexed to the plaintiff's memorandum heretofore filed with the court and if I could I would like to use that particular one. I take it that it is here. I filed it with my memorandum.

The Court: This one (indicating document)?

Mr. Brett: Yes.

The Court: If it is agreeable with counsel, that may be removed.

Mr. Weisz: That is agreeable, your Honor.

The Court: All right. [122]

Mr. Weisz: It may be removed.

The Court: Just remove it from the file and put it into evidence. Is it attached to the memorandum?

The Clerk: It has been attached to the file.

The Court: It will be received in evidence.

Mr. Brett: Now, I assume that should be given an exhibit number.

The Court: Yes.

Mr. Brett: I believe that will be No. 34.

The Court: Yes, it will be next in order.

The Clerk: That will be Exhibit No. 34.

(Said booklet was received as Plaintiff's Exhibit No. 34 in evidence.)

Mr. Brett: Next I offer in evidence as Plaintiff's Exhibit the little yellow volume. What number is that?

Mr. Weisz: No. 31, I think.

The Clerk: The little yellow booklet, entitled, "Atomic Test Effects"——

Mr. Brett: Yes, it is the official report of the Atomic Energy Commission entitled "Atomic Test Effects in the Nevada Test Site Region," which has heretofore been marked Exhibit No. 31 for identification, and particularly that portion thereof which is on pages 10 through 14 under the heading "The Sound or Blast."

Mr. Weisz: We object to that, your Honor, on the [123] ground that it is hearsay and on the ground that it is irrelevant and immaterial.

Mr. Brett: It is offered on the basis that it is an official Government report issued by one of the executive agencies and is a matter of which the court will take judicial notice.

The Court: Overruled. It will be received.

Mr. Brett: I beg your pardon, sir?

The Court: It will be received.

(Said booklet marked as Plaintiff's Exhibit No. 31 was received in evidence.)

Mr. Brett: Now, I desire next, your Honor, to proceed with the depositions which the Government took, which I am going to offer as part of the plaintiff's case.

Do you desire me to continue now?

The Court: We will recess at this time.

Mr. Brett: I think we can finish all right tomorrow.

The Court: All right. We will recess. We will recess until 9:45.

Mr. Brett: Thank you.

Before your Honor recesses I would like to state that I have obtained a copy of the deposition of Brigadier General Fields, and so has counsel, but neither of us were furnished with the attachments.

I realize that normally we don't break the seals and [124] look at those matters until they are offered, but I would like to see them and I assume counsel would. Unless there is some objection I would like to open and examine them for a few minutes.

The Court: You may have such leave.

Mr. Brett: I did not attend the session in Washington and therefore I did not see them.

The Court: Yes, you may break the seal and examine them.

(Whereupon, a recess was taken until the following day, Wednesday, May 11, 1955, at 9:45 a.m.) [125]

Wednesday, May 11, 1955—9:45 A.M.

(The court hears another matter.)

The Court: The clerk will call the case on trial.

The Clerk: No. 14,795-WB Civil, Bartholomae Corporation versus United States of America, for further trial.

Mr. Brett: Ready for the plaintiff.

Mr. Weisz: Ready for the defendant.

The Court: You may proceed.

Mr. Brett: Thank you, your Honor.

The plaintiff will call Mr. William A. Bartholomae, Jr.

WILLIAM A. BARTHOLOMAE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Your full name, please.

The Witness: William A. Bartholomae.

Direct Examination

By Mr. Brett:

Q. Where do you reside, Mr. Bartholomae?

A. In Los Angeles County, Diamond Bar Ranch.

Q. And what position do you occupy with the

(Testimony of William A. Bartholomae.)

corporate plaintiff in this case, the Bartholomae Corporation?

A. I am the president and general manager.

Q. Sir?

A. President and general manager. [128]

Q. You are familiar with its property known as the Bartholomae Fish Creek Ranch?

A. Yes, sir.

Q. And with the improvements that are erected thereon? A. Yes, sir.

Q. Did you have anything personally to do with the erection and construction of those improvements? A. Yes, sir.

Q. What did you have to do with them?

A. Well, I helped in the designs, in the specifications and the actual construction on the job.

Q. When were those buildings erected?

A. In 1941.

Q. Before that time, Mr. Bartholomae, had you had other experience in the design and supervision of construction of buildings? A. Yes, sir.

Q. And had you had such experience with reference to other areas where there were extreme colds and extreme temperatures? A. Yes, sir.

Q. And where? A. In Alaska.

Q. And where in Alaska?

A. Well, both, at three places, Fairbanks, Nome and [129] Teller.

Q. And that was in connection with your company's operations? A. Yes, sir.

Q. Will you state to the court the nature and

(Testimony of William A. Bartholomae.)

the character of the plastering that was done in the buildings that were in the headquarters ranch?

A. Well, we had very low humidity in the area, so we adopted a program of what is known as a 3-coat plaster job over button board.

Q. In which of those buildings was the plaster covered with paint or some other substance?

A. Just in the cookhouse and the dining room area which was all one large room. For sanitation purposes, we painted that room only.

Q. All others then were unpainted?

A. Yes, sir.

Q. Were there any heatings in the Bartholomae cottage during the winter months?

A. There wasn't during the year 1951.

Q. That is, in October-November, from then on, in 1951 there were not?

A. That is correct, yes, sir.

Q. Are you familiar, Mr. Bartholomae, with the fact that there had been a crack in the ceiling of the building [130] in which the dining room is located?

A. Yes.

Q. Which building was that, by the way?

A. That was the messhall. I think that was Building No. 4.

Q. Is that the cookhouse building?

A. That is right, yes, sir.

Q. As shown on Plaintiff's Exhibit 2?

A. Yes, sir.

Q. When did that cracking occur?

A. It occurred in about June of 1943 when we

(Testimony of William A. Bartholomae.)

were engaged in the painting operation of that room.

Q. Did you personally go to the property and inspect it from time to time? A. Oh, yes.

Q. Did you visit the property on May 30 of 1952? A. Yes, sir.

Q. Now, from the date which you have just given, which I believe was 1943, did you regularly inspect the properties? A. Yes, sir.

Q. Up until the time you again visited it?

A. Yes, sir.

Q. And up until May 30, 1952, were there any cracks in any of the walls in any of the buildings, except the one that had been repaired in the mess-hall? [131] A. None that I could see.

The Court: Now, just a minute. Read that question.

(Question and answer read.)

The Court: I don't think you want to ask that question.

Mr. Brett: I beg your pardon?

The Court: I don't think you want to ask that question. There were other witnesses here that testified there were cracks, there were cracks in the fall of 1951.

Mr. Brett: Well, that is true, your Honor.

The Court: He has testified now that there weren't any cracks until May of 1952.

Mr. Brett: Well, I was going to ask him:

Q. When was the last time before May 30, 1952,

(Testimony of William A. Bartholomae.)

that you personally saw the property, Mr. Bartholomae?

A. I would say about September 8, 1951.

Q. That is when it was visited by Mr. Norwood?

A. Yes.

Q. Now, Mr. Bartholomae, what kind of an operation have you had at that location?

A. Well, we have a rather sizable cattle operation, a cow and calf outfit. We have about 350,000 acres.

Q. I am not asking the individual's name, but the designation. Whom do you have as the representative of the corporation on the property, in charge of it?

A. We have a foreman on each of our ranches, and we had [132] one at that ranch.

Q. And in the course of the corporation's operations are there any regulations that you have with reference to reporting by your foreman or superintendent?

A. Yes. The regulations are that the superintendent reports to me by telephone once a week, usually at Friday noon, and during the forepart of the week a written report is made direct to the office.

Q. Is the foreman also required to report any damage to the property or any needs of the property?

A. Oh, yes.

Q. And has that been the course of operations throughout the operation here of this property?

A. Yes, sir.

(Testimony of William A. Bartholomae.)

Q. Who is the custodian of those records of your corporation? A. The assistant secretary.

Q. And what is his name? A. Mr. Loy.

Q. Mr. Loy? A. L-o-y, Stanley Loy.

Q. Mr. Bartholomae, what, in your opinion, was the fair market value of the buildings which comprise the headquarters of the Bartholomae Fish Creek Ranch as of October 1, 1951?

Mr. Weisz: Objected to, your Honor, on the ground that [133] the opinion is being asked of an officer—the corporation as to the market value of buildings on a ranch in Nevada, an opinion which the witness cannot testify to as an expert. I think it is not permissible in these proceedings.

Mr. Brett: If your Honor please, it is adduced on the basis of the law that the owner of property may always express an opinion as to a value, and, of course, a corporation may express it through its executive officer.

The Court: Yes. If that is your objection, the objection is overruled. Unless it is a preliminary question, I frankly don't see the materiality of it. No one contends that the buildings were totally destroyed.

Mr. Brett: Oh, no.

The Court: I don't understand the materiality, but you may proceed.

Mr. Brett: Well, may I state to your Honor that it is my concept that an award to be made can be fixed in various ways. One way is by the reasonable cost of restoration, which we have shown, and

(Testimony of William A. Bartholomae.)

which I will also show through this witness.

The other is by the before and after method of the market value of the property, and that is true irrespective of whether it was destroyed or whether it was injured.

The Court: Well, counsel, at this point it is not material. As I stated, it may be a preliminary question. In [134] other words, the evidence that has been in so far wouldn't be at all material, unless, of course, you are subsequently going to show its value after the occurrence. The objection is overruled, so you may proceed.

Mr. Brett: Mr. Reporter, read the question, please.

(Pending question read.)

A. I will say \$200,000.

Q. Now, you saw the properties during your visit there on May 30th of 1952? A. Oh, yes.

Q. And you examined the condition of the property at that time? A. Yes, sir.

Q. Now, what, in your opinion, was the fair market value of the improvements at the headquarters of the Bartholomae Fish Creek Ranch in the condition in which you saw them on May 30, 1952? A. I would say \$165,000.

Q. Now, will you state your reasons for that opinion?

A. My reasons for that opinion are, first, that in order to restore the buildings it would cost \$25,000 to replaster them; and there would be a ten

(Testimony of William A. Bartholomae.)

to fifteen thousand cost for temporary buildings while the job was in operation for obsolescence, because we would have to carry on our operations there and would need buildings. So I estimate [135] that would be the value.

Q. Now, did you seek to determine what might be an acceptable substitute for replastering?

A. Well, there would be no real substitute, but we did explore the idea of getting the buildings in repair at a minimum of cost and a minimum of inconvenience.

Q. Is it, or is it not true, that you have had substantially continuous operation of putting improvements on your ranch in that area?

A. Yes, over there we do some building every year.

Q. And you personally check and supervise that? A. Oh, yes.

Q. And in connection with that, have you kept yourself acquainted with the possible places from which you could obtain the necessary labor and materials? A. Yes, sir.

Q. Now, what is the nearest inhabited place to the ranch? A. Eureka, the County Seat.

Q. And about how far away is that?

A. About twenty miles.

Q. What is the nearest next inhabited place of any substantial size? A. That would be Ely.

Q. How far away is that? [136]

A. 80 miles.

Q. Now, was there any labor supply, which

(Testimony of William A. Bartholomae.)

would be capable of performing the necessary repairs on these properties, at this town of Eureka?

Mr. Weisz: Objected to as calling for a conclusion of the witness, your Honor, and no foundation laid as to whether this witness would know of labor supply in general or of any particular type in Eureka or at Ely, or in any other place, for that matter.

The Court: Objection overruled. He is asking him if he knows.

A. I did make inquiry. In other words, I asked for bids at Ely.

Mr. Brett: Did the court sustain the objection? I didn't hear it.

Mr. Weisz: The court overruled the objection.

The Court: I overruled that, but his answer is not responsive.

Mr. Brett: That is what I thought. Will you read the question now, please?

(Pending question read.)

The Court: Now, you can answer that yes or no, if you know.

A. No.

Q. (By Mr. Brett): Now, was there any adequate supply [137] at the town of Ely?

A. No.

Q. Did you obtain a firm bid from anyone for the doing of the work? A. Yes.

Mr. Brett: I will ask the clerk to mark these

(Testimony of William A. Bartholomae.)

three sheets as Plaintiff's Exhibit 35 for identification.

(Said three pages of document were marked as Plaintiff's Exhibit No. 35 for identification.)

Q. (By Mr. Brett): I show you Plaintiff's Exhibit 35 for identification, three sheets, and ask you if this is the bid you refer to?

A. Yes, this is the bid.

Q. And is that the lowest bid you were able to obtain from the solicitation of bids?

A. Yes, sir.

Mr. Brett: I will offer that in evidence as Plaintiff's Exhibit No. 35.

Mr. Weisz: No objection. There will be no objection to this.

The Court: It will be received. What is it?

Mr. Brett: It is the Norwood & DeLonge bid.

The Court: Mr. Norwood's bid?

Mr. Brett: Yes, sir.

The Court: All right. It will be received.

(Said three-page document marked as Plaintiff's Exhibit 35 was received in [138] evidence.)

Mr. Brett: That is all.

Cross-Examination

By Mr. Weisz:

Q. Mr. Bartholomae, are you an engineer, sir?

A. Pardon me?

Q. Are you an engineer? A. Yes.

(Testimony of William A. Bartholomae.)

Q. Of what type? A. Civil.

Q. A civil engineer. Now, have you ever lived in the town of Ely, Nevada? Rather, did you live in the town of Ely, Nevada, in the latter part of the year 1951?

A. For a period of not more than a week, yes.

Q. Are you familiar with the labor situation in Ely, Nevada? A. Yes.

Q. When you were in Ely, were you employing labor, particularly construction labor?

A. Not in Ely, no.

Q. Did you employ construction labor in Eureka? A. Yes.

Mr. Weisz: I have no further questions.

Mr. Brett: That is all, Mr. Bartholomae.

The Court: You may step down.

(Witness excused.) [139]

Mr. Brett: The plaintiff will call Mr. Stanley Loy. Mr. Loy, before you go up there, take the original of those papers.

STANLEY A. LOY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Your full name, please.

The Witness: Stanley A. Loy.

Direct Examination

Mr. Brett: Will your Honor pardon me for a moment until I show counsel this document?

(Short intermission.)

(Testimony of Stanley A. Loy.)

By Mr. Brett:

Q. Mr. Loy, where do you reside?

A. Diamond Bar Ranch, Los Angeles County.

Q. And what position do you have with the plaintiff, the Bartholomae Corporation?

A. Assistant secretary and office manager.

Q. And did you have that position during the year of 1951? A. Yes, sir.

Q. And continuously since that date?

A. Yes, sir.

Q. Are you the custodian of the records of that corporation? A. Yes, sir. [140]

Q. Do you have in your possession the original of a report dated December 20, 1951, to the Bartholomae Corporation at its Fullerton office, from Arthur J. Seale, Bartholomae Fish Creek Ranch?

A. Yes, sir.

Q. Will you find that please?

A. Do you want me to remove it from the file?

Q. If you will, please.

(Witness removes document from file.)

Q. Now, do you also have in your file, the records of the corporation, a report by Arthur J. Seale to the Bartholomae Corporation, Fullerton office, dated April 27, 1952? A. Yes, sir.

Q. Will you find that, please?

(The witness produces document.)

Q. Now, Mr. Loy, have you had photo copies of those communications made and delivered to me?

A. Yes, sir.

(Testimony of Stanley A. Loy.)

Q. And you have personally delivered them to me so that you have compared them? A. Yes, sir.

Q. And aside from the inked notations which appear on the communications, the communications are in the same form as they were when you originally received them for the [141] corporation?

A. Yes, sir.

Q. And they were received in the ordinary course of business of the corporation? A. Yes, sir.

Mr. Brett: Your Honor, by reason of the California Code that you can use photo copies of these documents and since we have the originals in our office, I am going to have the clerk mark photo copies, but I will show the Government counsel if necessary the originals. I think it is the 1953 State Code. If your Honor isn't familiar with it, I will get it.

The Court: I am familiar with it.

Mr. Weisz: There will be no objection to those being copies. There will be objection to the documents.

Mr. Brett: I understand that. I first wanted to explain to your Honor why I am using the photo copies. I will ask the clerk to mark a photo copy of a two-page letter dated December 20, 1951, as Plaintiff's Exhibit No. 36 for identification and to mark a photo copy of a one-page communication dated April 27, 1952, as Plaintiff's Exhibit No. 37 for identification.

(Testimony of Stanley A. Loy.)

(Said documents were marked as Plaintiff's Exhibits Nos. 36 and 37, respectively, for identification.)

Q. (By Mr. Brett): Now, Mr. Loy, I have the photo copies. You have the originals before you. Will you state whether or not the writing that is on the first page, and I [142] will show it to you, Plaintiff's Exhibit 36 for identification, which reads in figures "12/26/51" and "Loy," is in your handwriting? A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

Q. And what did that date indicate as a part of your records?

A. That indicated the date that I received that document.

Q. In other words, the date that it was received by you as an officer of the corporation?

A. Yes, sir.

Q. And has the original of that communication been in the files and records of the corporation ever since? A. Yes, sir.

Q. Now, in reference to Plaintiff's Exhibit No. 37 for identification, I will ask you if the writing "5/10/52" and the word "Loy" is also in your handwriting? A. Yes, sir.

Q. And indicates the same thing?

A. Yes, sir.

Mr. Brett: At this time, if the court please, I offer the two communications under the provisions of Title 28, Section 1732, as a record made in the

(Testimony of Stanley A. Loy.)

regular course of [143] business, but I offer them for a limited purpose in this case. I understand that receipt of these matters is discretionary with the court and while there are some decisions that are rather broad as to the admission of many things, I offer only that portion of them which refers to the dates and I offer it for the reason, if the court please, that it was apparent, when we took the deposition this spring of the witness Earl J. Seale, that he was very hazy in his recollection of dates.

I offer these as communications received in the regular course of business and as occurring at or about the time or within a reasonable time after the dates which are given therein, and I offer them only for that purpose.

Mr. Weisz: I will object to them, your Honor, on the following grounds:

First, that the regular course of business exception is for a particular purpose, namely, to avoid the necessity of bringing in the person who has made the record himself, and because of the usual course concept here. However, we find first of all, that the first report which occurred was December 20, 1951.

Now, Mr. Bartholomae has testified that reports are made weekly. If the allegations of the complaint are true, then, the last test would have been on the 5th of December. Apparently, this was not the weekly report, from Mr. Bartholomae's testimony, in which damage would have been reported [144] to the Bartholomae Corporation. From a very cursory

(Testimony of Stanley A. Loy.)

examination, I would take it that these reports are letters.

Actually, there is a good portion of the argument that goes to relevancy, and so forth, and the court would have to examine the documents beforehand, before that argument could properly be made.

However, I submit that these are not reports in the usual course of business, but are rank hearsay; that the testimony of Mr. Bartholomae establishes that these are not reports in the usual course of business, and the attempt is made at a later time to put in a hearsay statement for the purpose of refreshing the recollection of a witness whose testimony has already come forward. That is certainly a wide application of the business entry rule.

Mr. Brett: Well, your Honor, I think it is within your discretion.

The Court: The objection will be overruled. Let them be admitted.

(Said documents marked as Plaintiff's Exhibits Nos. 36 and 37 received in evidence.)

Mr. Brett: That is all, Mr. Loy.

Do you have any questions?

Mr. Weisz: No cross-examination.

Mr. Brett: Now, if the court please, as the next part of the plaintiff's case, I am going to read portions of the [145] depositions of three witnesses employed by the United States, whose depositions were taken by and on behalf of the United States, and in so doing I adduce such witnesses as adverse wit-

nesses and I want the record to so show, that they are being adduced as adverse witnesses and pursuant to Section 2055 of the Code of Civil Procedure of the State of California. I will, however, conform to the Federal rule that such excerpts will not be of such character that they will not be a complete reference to whatever material is adduced. I find that under the law, your Honor, it appears to be the proper course to inform the court that we are calling them as adverse witnesses, when we use their depositions. That is the reason I make that statement.

The Court: Well, when you take their depositions, you take their depositions as adverse witnesses.

Mr. Brett: That is right.

The Court: But, as I understand it, these depositions were not taken by you as adverse witnesses. You made two inconsistent statements. As I understand, these depositions were not taken as depositions of adverse witnesses, but that the depositions were taken by the defendant.

Mr. Brett: That is right.

The Court: It is not the taking of the deposition of an adverse witness. However, of course, that doesn't mean that you can't use the deposition, because when the deposition [146] is taken by either party, either party can use the deposition, it doesn't make any difference. When a deposition is taken, either or both parties can use it, whether it is taken as an adverse witness or not. The only thing that is of any importance is when it is being taken as an adverse witness, in the taking of the deposition

itself, in the examination on the deposition itself, then it becomes important whether he is being examined as an adverse witness, because of the scope of the examination.

But, when you have the deposition, you don't have to rely on it. Either party can examine in the deposition.

Now, the only question I want to ask is this: The deposition has been taken. Do I understand that the defendant is not willing to read those depositions into evidence?

Mr. Weisz: They will be read, your Honor.

The Court: Then, of course, it is superfluous. Why would you want to read them, too? Do you want to read them twice?

Mr. Brett: Well, I want to use parts of them to make my case. Now, as I understand it, counsel intends at the close of my case to make a motion addressed to his court for a non-suit.

The Court: All right. And at that time, if you feel that your case is insufficient, because of something that is in those depositions, you can refer to it. In other words, [147] I will not grant the motion without giving you an opportunity to present it to the court; in other words, I will treat it as though they were before the court. I just don't want you to read them twice.

Mr. Brett: Oh, that is all right.

The Court: If they are going to be in evidence. Or you can put them in evidence yourself, the whole depositions.

Mr. Brett: No. I find, your Honor, under the

law we don't have to put the whole depositions in.

The Court: No, you don't have to put the whole depositions in, but I am saying if they are offered, I don't want them in twice.

Mr. Brett: All right.

The Court: In other words, I don't want you to take the time to read, for instance, half of a deposition and then when you get through you are going to again read the deposition in toto, repeating what had been read in before. That is all I am interested in, is the time element.

Mr. Brett: Your Honor, I think that is an excellent idea. I did not understand you would make that ruling if it developed that I should put something in to meet a motion for non-suit. I don't want to repeat.

Then I will rest the plaintiff's case at this stage, with the request that if it develops such as your Honor said, that I may then make a request to put other evidence in. [148]

Now, your Honor, in connection with the motion or any argument I would like to have an opportunity before I answer it, of having about a five-minute recess to have the bailiff get me a few books that I would want to use in replying, and I will ask for that, at that time.

The Court: Very well. You do not plan on making an extended argument, do you, Mr. Weisz?

Mr. Weisz: No, your Honor. I think if the court will allow me, I can adopt the arguments made in our briefs to a great extent, because the court is familiar with the law that has been heretofore cited.

The Court: You are merely going to refer to the matter in your memoranda, in the motion to dismiss?

Mr. Weisz: Yes, sir, your Honor, and I am going to refer to our pretrial order. I am going to make a motion to dismiss on the ground that the plaintiff's case as to each of the four counts set forth in the complaint is insufficient in law, and we are now squarely presented with some of the issues of law that we had set forth where I am contending that as a matter of law, not as a matter of weighing the evidence but as a matter of law, we are entitled to a dismissal at this point, on the grounds (1) no negligence shown; (2) no causation shown in law; (3) the doctrine of *res ipsa loquitur* is not applicable; (4) that the count based on absolute liability is not well taken as a matter of law; and (5) I think to a [149] great extent the depositions that will come in, as far as those are concerned here, will not advert to the fourth cause of action, which is the inverse condemnation count.

The Court: In other words, you are only making the motion as to the first three counts?

Mr. Weisz: Yes, your Honor.

The Court: You are just making the motion as to the first three counts.

Mr. Weisz: As I understand the ruling of the court, the depositions are important as to all counts. Is that your understanding, Mr. Brett?

Mr. Brett: What is that?

Mr. Weisz: That the depositions that you want in are important as to which counts, all of them?

Mr. Brett: Important to all of them, yes.

The Court: At any rate, you are just making the motion to dismiss as to the first three.

Mr. Weisz: As to the first three, yes.

The Court: And you have submitted it?

Mr. Weisz: Yes.

The Court: The motion is denied. We will take a five-minute recess and then you can put on your case.

(Recess.)

Mr. Weisz: Your Honor, with regard to the defendant's case, we will start with the deposition of Dr. Alvin Cushman [150] Graves.

Mr. Brett: Shall I take the stand and read the answers?

The Clerk: May these depositions be opened, your Honor?

The Court: Yes.

(Whereupon, the deposition of Dr. Alvin Cushman Graves previously taken on behalf of the defendant, was read by counsel for the parties as follows, to wit:)

DEPOSITION OF DR. ALVIN CUSHMAN GRAVES

“Direct Examination

Q. Would you state your name, please?

A. Alvin Cushman Graves.

Q. And your address, sir?

A. 1459-46th Street; Los Alamos, New Mexico.

(Deposition of Dr. Alvin Cushman Graves.)

Q. And by whom are you employed at the present time, sir?

A. The University of California; Los Alamos Scientific Laboratory.

Q. And what is the business of the Los Alamos Scientific Laboratory? What is its pursuit?

A. It's a weapons' development laboratory of the Atomic Energy Commission.

Q. And what is your position with the Los Alamos Scientific Laboratory?

A. I am a Division Leader; the laboratory is divided into nine divisions and I head one of those divisions. [151]

Q. Which division is that, Dr. Graves?

A. It's called J. Division. It has the responsibility for conducting these weapons tests for the Laboratory.

Q. Other than as Division Leader, do you have any other positions?

A. I don't understand your question. I am paid by the Laboratory only—I'm not——

Q. I mean, do you function only as a division leader of the Laboratory? A. No.

Q. How else do you function?

A. Well, as a Division Leader of the Laboratory, I'm a member of the so-called Technical Board of the Laboratory, which has the responsibility for establishing laboratory policy; I'm a member of the test organization out here in Las Vegas which actually conducts the weapons' tests; in that particular organization, during the period in question, my title

(Deposition of Dr. Alvin Cushman Graves.)

was Test Director. I am a member of a Committee responsible to the Atomic Energy Commission for establishing classification policy; this is the so-called Committee of Senior Reviewers.

Q. Is there anything further that you function as? A. Not that I can think of. [152]

Q. Will you give us a background, Dr. Graves, of your education and experience since completing your formal education?

A. I attended the University of Virginia, and received a Bachelor of Science degree in electrical engineering in 1931; I attended the Massachusetts Institute of Technology where I took graduate work in electrical engineering. I attended the University of Chicago where I received my Ph.D. in physics in 1939. While at the University of Virginia and also at the University of Chicago, I had various Fellowships, scholarships and instructorships which permitted me to engage in teaching various subjects; at Chicago, in particular, I instructed in physics; from the University of Chicago I went to the University of Texas as instructor in physics; I became an assistant professor, and then an associate professor, and I am, in fact, now on leave from the University of Texas; and in connection with this particular job I still supervise the research work, candidates for advanced degrees, both Masters' and Doctors' degrees in physics.

Right after Pearl Harbor, Dr. Compton, Arthur Compton, called me from the University of Chicago and asked me to come there and engage on what is now known as the metallurgical laboratory. [153]

(Deposition of Dr. Alvin Cushman Graves.)

This is a laboratory that built the first chain reacting pile, and I actually worked on that first chain reacting pile. When that particular job was completed, I left the metallurgical laboratory to go to what is now the Los Alamos Scientific laboratory as a staff member. I became a group leader in the laboratory, engaged in experimental work, then an associate division leader and am now, a division leader in that laboratory.

Q. Have you been conversant then with the Atomic Energy Commission experiments from its inception?

A. Well, the work was first started at Columbia University and was carried on there for about a year before the metallurgical laboratory started. I was not engaged in that portion of the work, so except for the first year, the answer is yes.

Q. Now, boiled down, is it not your job now, to test the atomic devices for the laboratory?

A. For the Commission, actually; yes.

Q. And how long have you been in this particular field of endeavor, the testing of the atomic devices or gadgets?

A. I have been in a senior position since 1947; however, I also participated in the test in New Mexico, in 1945. [154]

Q. Then you have been in on all the nuclear detonations from 1945 on?

A. No, I was not associated with those tests done in Bikini Atoll in 1946, and I was not in-

(Deposition of Dr. Alvin Cushman Graves.)

involved in the detonation in Japan in the war in 1945.

Q. But as to all of the others you have been?

A. Yes.

Q. In the course of your duties as you have reviewed them, did it ever become your function for the Laboratory, to inquire into the need for a Continental Testing Area for atomic weapons?

A. Yes.

Q. When did you make such inquiry?

A. Well, in early 1948 was the first instance, the first time this was seriously proposed, as I recall it.

Q. The prior explosion in New Mexico that was not—or was that set up as Continental Testing Ground, or was that to be a common thing?

A. No, that was a single experiment; there was no intention to make that a permanent proving ground or testing site.

Q. What we are discussing now is the desire for a permanent test site and when did the laboratory, or rather, did the laboratory request a Continental area? [155] A. Yes.

Q. And that was when? A. In 1948.

Q. And do you know the channel through which such a request would pass?

A. Yes. The Commission divides its work up among a number of field offices, of which the Santa Fe Operations Office is one, and the Santa Fe Operations Office exercises direct supervision over the Los Alamos Laboratory work; and hence, the

(Deposition of Dr. Alvin Cushman Graves.)

laboratory's request for such a site would go to the Commission through the Director of the Santa Fe Operations Office; the Commission again is divided up into several divisions, and the one that would receive this particular request would be the Division of Military Application, so that the channel would be from the Laboratory through the Santa Fe Operations Office, through the Division of Military Application to the Commission.

Q. Do you know whether the request of the Laboratory in 1948 passed through those channels?

A. It passed through those channels; it was turned down by the Commission.

Q. By the Commission or the Division of Military Application, do you know?

A. Of my own knowledge, I don't know." [156]

Mr. Brett: In the light of that, your Honor, I move to strike the previous statement as hearsay and as a conclusion of the witness, without foundation.

The Court: What statement?

Mr. Brett: The statement that "It was turned down by the Commission" or that it went through those channels.

The Court: All right. They may go out.

"Q. (By Mr. Weisz): Then, after 1948, when the request went through, was there further detonations? A. After 1948?

Q. Yes. A. Yes.

Q. Where was that?

A. Well, there was the detonation in 1951, and

(Deposition of Dr. Alvin Cushman Graves.)

there have been detonations since then, of course, too.

Q. I mean prior to the establishment of a Continental Testing Area, between 1948 and the establishment of a Continental Testing Area?

A. Operation Sandstone occurred in the spring of 1948; there was no detonation between Operation Sandstone and Operation Ranger, which was conducted in Nevada.

Q. There have been experiments with detonations in the Pacific, and where was Operation Sandstone conducted? [157]

A. In the Pacific, at Eniwetok Atoll.

Q. You mentioned Operation Ranger, which took place here in Nevada. Was that Operation planned for overseas? A. No.

Q. Were there plans at that time for other detonations? This is 1948, 1949 or 1950.

A. Yes, almost immediately after Operation Sandstone consideration was given to Operation Greenhouse to be conducted in the spring of 1951, at Eniwetok.

Q. And the laboratory was preparing for such an operation at Eniwetok? A. Yes.

Q. Within the laboratory were there objections to conducting that operation at Eniwetok?"

Mr. Brett: At that point, your Honor, the deposition shows this colloquy between counsel in the nature of an objection:

"(By Mr. Brett): In what way is that material to our case? I don't question the fact that the

(Deposition of Dr. Alvin Cushman Graves.)

Nevada Proving Ground was properly selected and used. Is there some element you expect to prove?

“(By Mr. Weisz): I am going into all the reasons [158] and need for setting up the Continental Testing Ground.

“(By Mr. Brett): I’ll stipulate that there was a need and still is a need; I think I would have to assume that anyway. I’m going to stipulate to that, to the facts that you have alleged, that after various studies they decided this was the best area and that it was selected in the manner which you alleged.

“(By Mr. Weisz): Well, I’d want to go over that but I will try and make it fast. May I have the last question read?”

(The reporter then read the question:)

“Within the laboratory were there objections to conducting that operation at Eniwetok?

“A. Well, as I pointed out, the request was made by the Laboratory for a Continental Proving Ground, and this was turned down; then the International situation became more tense and with the advent of the Korean War, it even became questionable as to whether or not an operation could be conducted at Eniwetok with safety. The laboratory felt strongly the need for that series of tests but was worried for fear they would not be able to conduct the tests, and hence, I don’t think you would say there was an [159] objection to the use of Eniwetok. There was a feeling it might be well to

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supplement this Pacific Proving Ground with another Proving Ground.

Q. What were the disadvantages of a Pacific Proving Ground?

A. Tests in Eniwetok are very expensive in terms of manpower and in terms of dollars, and in terms of time. If I take the last first, from the time of Operation Sandstone we had been considering Operation Greenhouse; this was a period of nearly three years and this was about as soon as the Laboratory felt it was able to carry on this Operation. This was a very long time; hence the Laboratory felt that if it could have a testing ground closer, this would be a big advantage to the nation in terms of speeding up weapons development.

In terms of money, the estimate had been given that Operation Pacific would cost about three times as much as an operation at some site closer at hand, and in terms of manpower, in terms of manpower it just took far more people to conduct an operation overseas than it would closer and moreover the people had to stay there a longer period of time.

Q. Could you take the necessary facilities contained in the Laboratory at Los Alamos to the [160] Pacific? Was there a problem involved in not having, or not being able to transport that which you had at the Laboratory to the Pacific?

A. You mean the whole laboratory?

Q. Well, did you feel a need for the whole Laboratory?

A. Well, a proving ground or test site is a

(Deposition of Dr. Alvin Cushman Graves.)

laboratory. You build the facilities you need. At Eniwetok we had a number of different experimental programs involved, and each one required something equivalent to a laboratory, so you take to Eniwetok those laboratory facilities you must have. You don't take others and one of the reasons is there's not enough real estate to put up a laboratory like the one at Los Alamos; it's very difficult to get laboratory equipment to work, too. You have a salt spray condition—it just doesn't work properly. There was no consideration whatever of trying to build a complete laboratory at Eniwetok, just what pieces of it you needed.

Q. Well, what you needed—was that sufficient? You say you take or build what laboratory facilities you needed. Is that a bare minimum or what? What is the effect upon the weapons program in removal to the Pacific Area, and building laboratories [161] and the like?

A. As I said originally, we all have a job at Los Alamos as well as a job in connection with these tests. The fact that a man is going to the Pacific to perform a test means he is no longer available at the home laboratory and the work of the home laboratory therefore suffers, so you would—you take what you must have with you but you certainly don't take more than that because you don't want to handicap the work going on at home.

Q. Then can one work at optimum in the Pacific area with regards to weapons development?

A. No. Many experiments you just can't do at

(Deposition of Dr. Alvin Cushman Graves.)

all there. Every experiment you do is harder; as I pointed out, your equipment just doesn't work well there; you have to air-condition buildings and even then there is corrosion of equipment; so it's just awfully hard in a tropical atmosphere.

Q. At the advent of the Korean War, to your knowledge, then, was there a problem in getting the necessary material to Eniwetok?

A. Yes, because of the requirements of Korea so much of the shipping of the United States was devoted to transporting things and soldiers to Korea that there was a period of two months, for [162] example, when we didn't have a single ship to take a shipment to Eniwetok; there was very great worry at the time that this would necessitate a postponement of Operation Greenhouse. I saw a teletype from the Commander in Chief of the Pacific to the Chief of Naval Operations which essentially recommended that Cinpak be given top priority on all shipping in the Pacific, which would have had the effect of giving us——"

Mr. Brett: I interrupted there and the following statement was made by Mr. Brett:

"There is absolutely—and I state it for the record—no issue at all that is raised by the plaintiff in respect to the desirability or the legality, or any other elements of the selection and the operation of a Nevada Proving Ground. I don't see how we could make an objection. I don't know if it could be done better some place else or not. While this is all very interesting and if I had time, I would

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like to hear it, I don't see the relevancy. What we have is some tests that the doctor knows most about that occurred at certain times in Nevada at the Nevada Proving Ground; I make no objection; I just can't see the relevancy. There will be no objection.

“(By Mr. Weisz): All right, then, let's try [163] and bring it down. Will you stipulate that there was a definite need for the establishment of a Continental Testing Area?”

“(By Mr. Brett): I will.

“(By Mr. Weisz): That various sites were examined by Dr. Graves and others with whom he was associated in order to find an optimum place for a Continental Testing Area from the viewpoint of numerous factors, one of which was public safety and that the Commission set up an area on that basis?”

“(By Mr. Brett): I will so stipulate.

“(By Mr. Weisz): Here is the other part of it that I want to go over with Dr. Graves, and that is this: The Laboratory prepares an annual program for itself which includes weapons testing, which goes through various channels to the Atomic Energy Commission, which approves it. Later on the Laboratory, which has said in a general way, we want to test certain types of gadgets which are nuclear devices in a period of a year on the annual Laboratory Program; they firm it up a little further and present it through channels to the Atomic Energy Commission stating that they want to test

(Deposition of Dr. Alvin Cushman Graves.)

certain things in Nevada in the spring of whatever year it may be, or the fall. In other words, they select more or less a good general date, [164] the number and type of shots or detonations, the value to be expected, the value to the weapons program to be expected and——”

Mr. Brett: And at that point I interrupted and there was this statement by Mr. Brett:

“Go ahead and let’s see. I think I will stipulate if he isn’t going into detail. I will probably stipulate.”

“Q. (By Mr. Weisz): Dr. Graves, can you tell us how a test series comes about, such as the test series that took place in the fall of 1951, from the Laboratory on through?

A. The original proposal for a test series is presented in a document prepared by the Los Alamos Laboratory once a year; this is called the Laboratory Program and is present to the Commission again through the Santa Fe Operations office and the Division of Military Application. This document will contain a great many items of no interest here on research and so on, and it will contain proposals for the next test series or perhaps even the next two; this will contain a list of tests, detonations, a description of those tests and a proposal for an approximate date for those tests; this is sent by the Commission [165] to two Committees, one called Military Liaison Committee, the other the general Advisory Committee; the Military Liaison Committee is a Military Committee, it essentially

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gets approval or comments from the Department of Defense; the General Advisory Committee is a group of scientists, who look at it from a scientific point of view, and then the program is approved by the Commission.

“As the time of a particular test gets closer the Laboratory sends in a specific proposal for that particular test series. This will repeat the information in the laboratory program in much more detail. It will discuss the amount of fissionable material required in its tests, its geometry, and will justify each of these tests by saying what is proposed to be learned and what will be its effect on the national arsenal of weapons. This goes through exactly the same channels as the Laboratory Program, and is approved by the Commission and then taken to the President and the President himself actually approves the test series and the expenditure of the fissionable material. This then comes back from the Commission to a Test Organization, with instructions to proceed with the test.

This Test Organization then prepares a proposal for this test series, setting specific dates and [166] times for these detonations and setting up a set of experiments which will be done on the detonations and actually says how it proposes to go about conducting that series, with due regard to the safety criteria which has been set up. This letter also is acted upon by the Commission and if approval is then given by the Commission, that is the way in which the particular series will be conducted.

(Deposition of Dr. Alvin Cushman Graves.)

Q. What are these safety criteria you mentioned set up by the Commission?

A. The criteria on which we are operating at the moment are set down by the Commission and are quite general in nature; they involve such things as the following: each shot to be made at the proving ground must be individually justified in terms of its value to the country as a whole; the total number of shots in a series is looked at, must be looked at, to be sure that the total number of shots is reasonable; the yield of a shot is specified for an air drop, a tower shot or a surface shot—the maximum yield for an air drop, tower shot or surface shot is specified. The amount of radio-active fallout is specified in terms of the maximum dose which can be given to anyone outside of the proving ground. Such criteria as that are those that are specified by the Commission. [167]

Q. Is the size, that is the expected yield of the shot, limited beyond the maximum setup?

A. Yes—well, a test is conducted because the Laboratory wants a piece of information. Once the Laboratory has decided it needs a piece of information it devises a device which will give it that information and in devising this—in planning this particular device, it picks as a small device as it can, consistent with the information required to get. This is for two reasons: For the reason of public safety we like to minimize the amount of yield and also for the purpose of conserving fissionable material, so that the Laboratory itself designs an

(Deposition of Dr. Alvin Cushman Graves.)

experiment which is as small as possible, consistent with getting the particular information it requires. Therefore, most of them are much smaller than the maximum values which could be shot.

Q. Were you test director in the fall of 1951?

A. Yes.

Q. Will you tell us what your duties were with regard to any particular shot during that period of time?

A. The Test Director is responsible for determining and firing the devices themselves, when he is instructed to do so. He plans and conducts all [168] of the hundreds of experiments which are done on each shot; he plans the operations that must go on, air operations, and so on, that are connected with each shot. During this series he was responsible for on-site and off-site radiological safety. He is the chairman of an Advisory panel which meets prior to each shot to consider the various factors involved in answering the question: shall we shoot this shot; such questions as, is the weather suitable, are the experiments ready, and so on.

Q. When does the advisory panel meet?

A. It meets for each shot approximately twelve hours before the shot. A briefing of this panel is scheduled, this briefing to consist of weather data, fall-out data, blast prediction data, and so on, and then essentially is on continuous duty from then on until shot time, to look at the subsequent data as it comes in to assure itself that the weather predictions are, in fact, being verified.

(Deposition of Dr. Alvin Cushman Graves.)

Q. Who were the members of the panel, at least their titles, during the fall of 1951?

A. I'm not sure I can recall exactly. I'll name some I know.

Q. Well, we're interested in the function of the man more than the particular individual. [169]

A. The panel at the time consisted of Dr. John Bugher, who is Chief of the Division of Biology and Medicine of the Atomic Energy Commission; Dr. Howard Andrews of the United States Public Health Service; Benjamin Holtzman, whose exact position at the time I just don't remember, but he is one of the most competent meteorologists in the country. Dr. Thomas Shipment, who is the head of the Health Division of the Los Alamos Laboratory. Dr. Walker Bleakley of Princeton University, who is recognized as one of the foremost authorities on shock waves and blast effects.

Q. Do you recall any others?

A. Well, there have been a number of others.

Q. I mean during this period?

A. I think this is roughly the group that was there then. General James Cooney, who was with the Division of Military Application as a radiological safety officer—I don't recall any others.

“Q. Was Dr. Cox part of the panel?”

Mr. Weisz: May I interject at this point. We had previously taken the deposition of Dr. Cox and it will be presented later in the Government's case.

“A. He was part of the panel when Dr. Bleakley left. We had either Dr. Bleakley or Dr. Cox

(Deposition of Dr. Alvin Cushman Graves.)

during [170] this series. Dr. Bleakley was there and was the panel member; Dr. Cox would tell the panel members what his predictions were and then Dr. Bleakley was the panel member who was serving as an expert in this field to advise on this prediction.

Q. And what was your position with this advisory panel?

A. I was the chairman of this panel.

Q. Now, what would the panel do after the initial briefing? Would they poll, or what? What was their function there?

A. This panel sat on duty essentially from then on until shot time; after this particular briefing a number of wind runs are made; these wind runs are presented to the panel; actually, they are posted on a bulletin board and the panel looks at these and can verify for itself that the actual weather is, in fact, verified by the forecast, or is not, as the case may be.

Q. Does the panel confer as to whether the shot will go off or not, is that the purpose of the panel?

A. Yes, this panel essentially recommends to the Manager to shoot, or not to shoot the shot, and then the Manager himself makes the final decision, and shoots or does not shoot the shot, as seems best. [171]

Q. You are the Test Manager?

A. The Test Director.

Q. And as Chairman of the Board, do you take

(Deposition of Dr. Alvin Cushman Graves.)

the recommendation of the panel to the Test Director, Carol Tyler?

A. Yes, he is sitting with the panel actually during this briefing and discussion, and the panel then takes a vote and say, the conditions are appropriate, they will say they will fire; then I will say to Carol, it's rather formal at this point, 'The panel recommends you fire this shot,' and Carol turns to the assembled audience and says, 'We will fire this shot tomorrow.'

"Q. Does the panel meet at the time that Dr. Cox's high explosive results come in?

A. The panel is essentially there—we have essentially a control building, the panel is in that building. If any member of the panel objects to the shot a formal meeting is held; a formal meeting normally is not held.

Q. So the panel remains in session down to the shot time? A. Yes.

Q. And if any member of the panel feels that some disadvantage is involved in shooting at that time, [172] then the panel reconvenes to consider again whether it is advisable to shoot on the scheduled time?

A. Yes, they meet on request; they don't just automatically meet. What would happen in such a case, Dr. Cox would come to me and say, for example, this high explosive charge indicates that there will be quite a shock wave in, for example, Las Vegas or Beatty; then one of two things can happen; either you could cancel the shot or if it does

(Deposition of Dr. Alvin Cushman Graves.)

not seem to be a serious enough situation for that, one could call Beatty and suggest—tell them we think there will be a considerable shock wave there in the morning, and ask that they open windows and take such percautionary measures as that.

Q. Now, with regard to the shots of October 22, October 28th, October 30th and November 5th of 1951, was this procedure followed?

A. Yes.

“By Mr. Brett:”

By Mr. Brett: I then asked, “Which procedure?

“By Mr. Weisz: The advisory panel—the twelve hour survey prior to shot? A. Yes.

Q. Were any one of those four shots delayed, do you recall? [173] A. Yes.

Q. Which one?

A. Well, the series as a whole was originally scheduled to begin on the 1st of October; perhaps a month prior to that time it was evident that we would not be ready for the series by the 1st of October and construction was just not up to schedule and hence, there was a two weeks' postponement in the field. When we were at the site there was a further delay from the 15th to the 19th for the same reason; on the 19th an actual attempt was made to fire the shot but technical difficulties prevented it and a further two-day postponement was taken; then on the 21st the panel recommended against shooting for weather conditions and a twenty-four hour delay was taken and finally the shot was fired on the 22nd; there were other delays on several

(Deposition of Dr. Alvin Cushman Graves.)

Q. Now, did that take place before each—when the shots actually went off there was this twelve-hour situation?

A. Yes, that's what you do; again, in that particular case, where you schedule a shot for the 20th of October, on the 19th of October the panel met at about 9 o'clock in the evening, and suggested a postponement; then on the 21st when there was again a postponement, the panel was held on the 20th at about 9 o'clock to consider whether that shot should be shot, and so on, each time on the day before the shot, you will hold a panel meeting.

Q. But the actual shot, when it went off, went off on the schedule it had been set on at least twenty-four hours in advance?

A. This is true with the exception of one shot where the panel met just before the time of the shot and asked that that shot be postponed for, as I recall it, an hour and a half.

Q. Was that one of the four I have mentioned, the 22nd, 29th or 30th of October or the 5th of November, [177] 1951?

A. That was the one of November 5th.

Q. Was the weather data continuously maintained during this hour and a half period?

A. Yes.

Q. And at the time set, after that hour and a half, did the detonation go off on the schedule that had been set for it?

A. Yes."

Mr. Weisz: By myself: "That's all I have."

(Deposition of Dr. Alvin Cushman Graves.)

“Cross-Examination

By Mr. Brett:

“Q. Doctor, after the test series had been approved and adopted in the manner in which you have described in your direct examination, and came then down to the testing grounds, as I understand it, you and the other panel members had then received both information and instructions as to certain factors, one was that you knew and were instructed to use—that is you knew what was to be used and were instructed to use a certain type of shot, expressed in energy, a certain degree of energy to be exploded, is that right? A. Yes.

Q. You were informed and were instructed to use at least within limitation, a certain amount of fissionable [178] material in a particular test?

A. Yes, sir.

Q. Now, you have referred to the terms air drop, tower shot and surface shot; do those terms mean what seems to be implied by their language; that the starting position of the shot was either on the surface or dropped from the air or from a tower?

A. No. The first two are correct, they were either on the surface or in the air; our blast on a tower is detonated on the tower.

Q. Were those particular matters as to whether or not they were to be an air drop or tower shot or whether a surface shot, were those stated in the information given to you and your group in the instructions? A. Yes.

(Deposition of Dr. Alvin Cushman Graves.)

Q. So that I will understand you and you will understand me, let's assume that there are four tests and they are a, b, c, and d. Now, would test 'a' not only include the amount of fissionable material but also include at least an indication of what, from a weapons standpoint, the Military wanted you to find out through that test, would it include that?

A. The original letter from the test manager to the Commission—say this is the test series we're going to start in this case on October 1st, we're going [170] to shoot—it would include for your shot 'a' the expected yield, the amount of fissionable material required, the dates on which it was—the target date for that shot; it would include the method of detonation, whether an air drop, tower shot or surface shot; it would include the value of the experiment, why it was being detonated from the point of view of both the Laboratory and the Military, and would contain a list of experiments to be done for the Laboratory and for the Military.

Q. Now, in other words, one of the matters that you were intending to test and to gain some information about, was the effect that would be produced from the standpoint of a weapon?

A. Well, if you will let me get technical here a moment, none of the devices tested in that series were weapons; none of these were weapons.

Q. I understand they weren't weapons. You have said this is a weapon testing experiment.

A. I said before, what is done here is to say,

(Deposition of Dr. Alvin Cushman Graves.)

Look, we need a piece of information, then design something which will give you that information, so in that sense it is an experiment, not a weapon.

Q. You were endeavoring to establish by using the amount of fissionable material, the method detailed [180] under the conditions which were indicated, to determine just what would be the effect of that experiment from the standpoint of force, the shock, air shock, to the extent of any fall-out and to the extent of any effective burning or whatever other things that would give information from which it could be ascertained what the effect of that might be as a weapon?

A. That was never a primary objective of these tests; the primary objective of these tests was to find out how you could improve the efficiency of utilization of fissionable material in designing a weapon. That is, if by using, let me use your numbers, by using X pounds or X grams of fissionable materials, you could get, say, a nominal bomb, twenty kilotons; and then if by some scheme you feel you know how to make this same energy yield with half of the X grams of fissionable material, this would be an interesting experiment, and you would design something to find out whether or not you could; so that in these tests it is such an object as that which is always the primary objective; then, since weapon tests are expensive and involve this very expensive material, you utilize these tests for a number of additional purposes and one of these

(Deposition of Dr. Alvin Cushman Graves.)

additional purposes is that the Military makes these experiments to find out what these blast [181] pressures are and what the thermal radiation is, as a function of time and distance.

Q. When you refer to thermal radiation, is that the burn effects of them? A. Heat.

Q. Now, you have stated in some detail, the care that was taken in this Committee, to determine that the prescribed conditions were both available and were in a position to be met; now, if I have interpreted your direct examination correctly, did either you or the Committee or the Test Manager have any authority to make a change in the nature of the test, and by a change I mean this: Could you have, without getting further authorization, have changed the amount of fissionable material that was prescribed for test 'a'?"

Mr. Brett: Before I read the answer to that, I want to be sure the Court heard the question.

The Court: I heard it.

Mr. Weisz: I can reread the question.

Mr. Brett: Yes, reread the question.

Mr. Weisz: "Q. Now, you have stated in some detail, the care that was taken in this Committee, to determine that the prescribed conditions were both available and were in a position to be met. Now, if I have [182] interpreted your direct examination correctly, did either you or the Committee or the Test Manager have any authority to make a change in the nature of the test, and by a change I mean this: Could you, without getting further au-

(Deposition of Dr. Alvin Cushman Graves.)

thorization, have changed the amount of fissionable material that was prescribed for test 'a'?

"A. No.

"Q. Could you have changed whether it was to be an air drop or tower shot or surface shot, that is change it from that which was prescribed in test 'b'?

A. Not without further authority, no.

Q. If the weather conditions, to the extent that you and the other experts were able to test them and prognosticate them, were of the type and character prescribed as those which were to exist at the time the test was to be made, were you authorized in any manner to authorize that the shot be made under different weather conditions, or did you have to, to the extent that you could, comply with those instructions?"

Mr. Weisz: Is that question clear to your Honor?

The Court: Yes.

Mr. Brett:

"A. The instructions never specified the weather conditions [183] which would minimize off-site problems. The instructions were more nearly, 'Pick such weather conditions as will minimize off-site conditions of one sort or another.' It was a job of the test organization, itself, to determine what weather conditions were, in fact, acceptable."

The Court: We will recess until 2:00 p.m.

(Deposition of Dr. Alvin Cushman Graves.)

(Whereupon, a recess was taken until 2:00 p.m. of the same day, Wednesday, May 11, 1955.) [184]

Wednesday, May 11, 1955—2:00 P.M.

The Court: You may proceed.

Mr. Weisz: May we resume the reading of the deposition, your Honor?

The Court: Yes. Please go back three or four questions and start from there.

Mr. Brett: That, your Honor, was the answer commencing on page 28, line 23. Do you want us to review that again for you?

The Court: Yes, just pick up there so I will get the feeling of it again.

Mr. Brett: Yes, your Honor.

(The reading of the deposition of Alvin Cushman Graves was resumed as follows:)

Cross-Examination

(Continued)

“Q. Now, you have stated in some detail, the care that was taken in this Committee, to determine that the prescribed conditions were both available and were in a position to be met. Now, if I have interpreted your direct examination correctly, did either you or the Committee or the Test Manager have any authority to make a change in the nature of the test, and by a change I mean this: Could you, without getting further authorization, have

(Deposition of Dr. Alvin Cushman Graves.)

changed the amount [185] fissionable material that was prescribed for test 'a'? A. No.

Q. Could you have changed whether it was to be an airdrop or tower shot or surface shot, that is change it from that which was prescribed in test 'b'?

A. Not without further authority, no.

Q. If the weather conditions, to the extent that you and the other experts were able to test them and prognosticate them, were of the type and character prescribed as those which were to exist at the time the test was to be made, were you authorized in any manner to authorize that the shot be made under different weather conditions, or did you have to, to the extent that you could, comply with those instructions?

A. The instructions never specified the weather conditions which would minimize off-site problems. The instructions were more nearly, 'Pick such weather conditions as will minimize off-site conditions of one sort or another.' It was a job of the test organization, itself, to determine what weather conditions were, in fact, acceptable.

Q. Let's frame it this way, Doctor: Assume that the instructions in some form were to the effect that you have just stated—that the test shot was to be made when the minimum unfavorable weather conditions [186] existed. Did you or any of this group have authority to change that and say we would like to find out what would be the result if we did it under the most unfavorable conditions?

(Deposition of Dr. Alvin Cushman Graves.)

A. No.

Q. In other words, you had described for you rather distinctly the nature and character of the things that were to be done? A. Yes.

Q. And the description to you was merely this: That you were to use such intelligence as you individually and collectively had, from your experience and such other sources of information as you could obtain to determine that the conditions existed which were the most favorable and at the same time would afford the carrying out of the test which was prescribed, but beyond that you had no right to change the particular specifications under which each test was to be made, is that true?

A. Your question is long. I think the answer is yes. We had considerable latitude in the experiments that were done; in fact, we had complete latitude as to whether we would measure thermal radiation or heat, or what—the types of experiments done were never specified to us. The device to be tested was supplied [187] to us and essentially we had a box, and we were not allowed to probe into that box, and we could make no change in that at all, but there was certainly no latitude as far as public safety was concerned. We were told to do these things in a manner consistent with public safety and we would have been severely criticized, I'm sure, had we done anything contrary.

Q. Well, when you say that you had—that you were severely restricted with reference to public safety, you don't mean to impart by that, that if

(Deposition of Dr. Alvin Cushman Graves.)

you collectively decided it would have been dangerous to detonate at all on the proving ground, a specified amount of fissionable material, that you would have had the right to countermand the order and not do it, do you?

A. I can say, I gave my advice on such matters and it was always taken, that is to setting up the original criteria, the number that was given; I originally gave my advice, which was, do not shoot anything larger than this, so in that sense, we all had a part in establishing the safety criteria.

Q. That is before it had been approved by what we might call a higher level? A. Yes. [188]

Q. After what had been recommended and approved, you would have had no authority to change it, would you? A. That is correct.

Q. Did you cooperate in the preparation of the report which the Atomic Energy Commission made in January, 1953, and that portion particularly which is denominated as Part 3, Public Safety in Continental Weapons Tests?

A. I believe so; this is the semi-annual report?

Q. Yes.

A. No. I'm not—I can't really answer you because I'm not sure where the source of the information in there may have come from."

Mr. Weisz: That report is the one in evidence, your Honor.

"Q. You don't recall then, that you participated in it?

(Deposition of Dr. Alvin Cushman Graves.)

A. I didn't participate in writing that particular document.

Q. Did you participate in writing the document, 'The Effects of Atomic Weapons' prepared for the Department of Defense in 1950?

A. Only in a consultant capacity.

Q. Did you read and approve it after it was completed? [189]

A. I read it; I didn't approve it.

Q. You were not called upon to approve or disapprove it? A. No.

Q. Relating to your testimony about the tests made in October and November, 1951, to the best of your knowledge were any of those tests made with any intent that the energy released should not be released to its fullest extent?

A. I don't understand.

Q. Were there any limitations upon those tests producing whatever effects might occur from the detonation? Didn't you and those who were conducting the tests both anticipate and intend that a certain amount of fissionable material would be exploded under certain conditions, and you were trying to find out what the effect of doing so would be?

A. Again, qualifying my answer just to the extent that the principal purpose of the tests that have been specified was a weapons development purpose, that is, finding out what the efficiency of using fissionable material was, why, the answer is yes, we actually detonated the device to find out what the efficiency was in essence.

(Deposition of Dr. Alvin Cushman Graves.)

Q. Putting it another way, although your [190] preliminary activities and those of the others which had been supplied—that is, the information, the rest of which had been supplied to you, might have indicated that these four tests would probably not cause an air shock upon, say, as example, fifty miles, there was nothing in your instructions and nothing in the intent that accompanied the detonation that you should, in any way, prevent its effect for a hundred miles, if it would have that effect, and, as a matter of fact, you were trying to find out whether or not your beliefs and prognostications would develop as a result of the test, isn't that true?

A. No; I have to say yes and no. I can't answer it all the same way.

Q. I find it difficult because Dr. Cox said it wasn't intended that the weapons produce results beyond certain distances; I want to find out on what you made those calculations. I do recognize from his testimony and yours that you eminent scientists anticipated from previous information the result would be of such and such character at such and such distance. Was there anything insofar as your efforts were concerned that accompanied those efforts by which you sought in any way to eliminate the effects of those detonations? [191]

A. Sure.

Q. What was it?

A. We picked the very best weather conditions we could so these effects would be minimized; I am sure Dr. Cox must have testified that if you have

(Deposition of Dr. Alvin Cushman Graves.)

the wind velocities and directions in a certain pattern that you can have a focusing effect of these shock waves at considerable distances, and it was our intent to minimize this with an attempt to avoid such pattern of winds that would put this focus of shock wave on any populated locality, so that the answer to your question is, sure, we tried to minimize the effects of this blast wave as much as we could.

Q. In any event, you could not definitely predict that certain effects of the explosion would go beyond that which you anticipated?"

Mr. Brett: I think the question was "would not go," but it does read "would go." I didn't catch that at the time, but I am quite sure my question was, "would not."

Mr. Weisz: I will read it again, and I am sure counsel is correct.

"Q. In any event, you could not definitely predict that certain effects of the explosion would not go beyond that which you anticipated?

"A. That's correct. We knew that these shock waves, [192] for example, could be detected at great distances; we had no reason to feel that we could confine any of these effects to your fifty miles, and it was clear once you start a shock wave going, it's going to go.

Q. Anyone would know that, wouldn't they?

A. Yes.

Q. And the very word, that is the word 'test' implies that you were taking a certain factor, to

(Deposition of Dr. Alvin Cushman Graves.)

wit: a certain amount of explosive material, you were taking a certain starting point and a certain method of exploding it? A. Yes.

Q. And you were taking a given factor so far as you could determine it, as close as you could to the time of the detonation, of weather and other conditions? A. Yes.

Q. And then you make the test with the intent and purpose of seeing just what would happen, isn't that true?

A. The intent and purpose was not to see what the shock wave would be at great distances; this was measured after the fact in order that we could see, in case someone wanted to know, but this was not a purpose of the test. I'm not trying to be difficult. [193]

Q. In a report which the Atomic Energy Commission has issued, entitled, *Assuring Public Safety in Continental Weapons Tests*, dated January, 1953, Page 85, there is this statement: 'The air shock wave produced by an aerial nuclear detonation of normal yield is the most important agent in producing destruction.' Do you disagree with that statement?"

Mr. Brett: Now, again, my recollection is that the question was, "Did you agree?" It seems to be borne out by the answer, but the text does read, "Do you disagree."

A. I would. It certainly is open to question but I think it is probably correct; the reason I qualify it is because I know in the Japan drops,

(Deposition of Dr. Alvin Cushman Graves.)

certainly one of the most important effects were the fires that were produced.

Q. Now, am I wrong or am I right? If that statement is reasonably correct with reference to the area of nuclear detonation of nominal yield, would it not be true that the air shock wave would be greater and therefore would be a greater effect if instead of being a normal yield it was a larger yield? A. Yes.

Q. And you know of your own knowledge, that, from the standpoint of the weapons test and the interest of the Department of Defense that one of the [194] primary elements which would be entered in a report of one of these tests would be what had actually been produced as an air shock from such test?

A. Correct—my only question here has been one of degree.

Q. Now, there is one other thing I am not clear on. Was there any question in your mind insofar as any of these four tests made in October, 1951, and November, 1951, that the force which was generated by these explosions would reach these areas which are known as the troposphere? A. No.

Q. The ozonosphere? A. No.

Q. The ionosphere? A. No.

Q. In other words, so far as you personally are concerned, you believed at the time that you gave the indication to the test manager to go ahead with any one of those four shots that there would be a portion at least of the force generated which would go into each of those three areas? A. Yes.

(Deposition of Dr. Alvin Cushman Graves.)

Q. Doctor, in this same report of January, 1953, entitled *Assuring Public Safety in Continental Weapons [195] Tests*, on page 79, it is stated that the only practical method of evaluating one of these nuclear gadgets, so-called here in quotes, is to detonate the nuclear gadget or device in order to test the design and the principle involved, do you agree with that? A. Yes.

Q. Now, it is also true, is it not, that at the time of those tests you knew that there was a certain amount of uncertainty and unreliability in the reactions from those detonations? In other words, that it had already been learned that by virtue of conditions that would come on within a relatively short time and perhaps also from conditions you had not as yet traced down, the shock wave would travel a short distance in one direction and a longer distance in another direction, and it might in some instances leap frog from one point to another?

A. Those effects were known, yes.

Q. Assuming that by some method of testing, some one of the group had been able to convince the group that if you conducted any one of the four tests, there was a possibility that a shock wave might both travel to and cause damage at a location a hundred seventy-five miles away, would you have had any authority to discontinue the test for that reason? [196] A. Sure, we had the authority.

Q. You had authority to discontinue it entirely?

A. For example, if we felt—St. George is about

(Deposition of Dr. Alvin Cushman Graves.)

that distance, I guess, if we had the information which would have indicated that St. George would have been damaged by a shock wave, we had complete authority to discontinue that test; you are talking about under those weather conditions?

Q. I am talking about if it was determined, irrespective of weather conditions or what, that it might cause damage at St. George, did you have authority to discontinue and not make the test?

A. Suppose the Commission had told you, 'You will make that test.' The Commission itself, has the ultimate authority.

Q. As I understand it, at the time you made the tests which stem from the President of the United States, you were told to make these tests.

A. We had the responsibility to go back to the Commission and say, 'This test is dangerous.' It was not only authority not to do the shot, we had the responsibility not to do it.

Q. But unless the instructions were changed you had no responsibility not to make the test?

A. That's correct. [197]

Q. Now, you have had no instructions, even general to taper off, or change those instructions merely on the basis that you might find some isolated ranch building or some isolated group of cattle that would be injured from the test, have you?

A. I don't believe we would be able to be specific as to a dot on the compass and say this shock is going to focus right there; so, isolated ranch buildings—well, we just simply couldn't tell

(Deposition of Dr. Alvin Cushman Graves.)

whether it was going to hit that or five miles from there.

Q. You couldn't either prognosticate or compute down to that fine point and say it won't strike that ranch or that particular locality?

A. We can say it can hit a particular locality.

Q. And by locality, you mean an area of some size?

A. Yes."

Mr. Brett: And I stated that was all.

Mr. Weisz: And "Redirect Examination" by myself:

Redirect Examination

By Mr. Weisz:

"Q. In the proposal from the Los Alamos Laboratory, there is set up initially the expected yield and the type of shot for each one of the tests in a series, is that correct?

A. In that series, yes.

Q. When the Commission authorized this [198] particular test series, did they follow the yield and type of shot recommendation of the Los Alamos Laboratory?

A. Yes.

Q. Then, when it came to time of test, the type of test, the amount of material and the yield to be expected therefrom, those were fixed by that approval of the Commission of the original proposal of the Los Alamos Laboratory, is that correct?

A. Yes.

Q. And it was that from which you could not depart?

(Deposition of Dr. Alvin Cushman Graves.)

A. The test organization, whenever it had a question on safety, would have, in fact it did have the responsibility of saying, 'This simply must not be done.' There was no fooling around with the safety requirement. I can't imagine a condition where the test organization said, 'This is unsafe' and the Commission said 'Go ahead and shoot.' It never happened and I can't conceive it ever happening.

Q. As a member of the Technical Board of the Los Alamos Laboratory, can you tell us whether safety factors were considered in making the original proposal for the test series of the latter part of 1951? [199] A. Yes.

Q. The blast effect that is produced by the atomic detonation, is that blast effect the same as that produced by a high explosive detonation?

A. Essentially, except in degree.

Q. Except in degree. In other words, we have merely the law of physics and meteorology applied to the effect of a detonation of any type?

A. This is essentially true, yes."

Mr. Weisz: And by myself: "I have nothing further."

Then, there is

"Recross-Examination

By Mr. Brett:

"Q. Counsel again has referred to yield. Yield as I understand it is an estimate of the energy?

(Deposition of Dr. Alvin Cushman Graves.)

A. That is correct.

Q. Am I wrong in my assumption that you did not, in making the recommendation to the Commission which you have stated went through the various steps which you detailed, to the President and finally came back to you at the Nevada Proving Ground, that that did not include any specification to the effect that it will cover only ten or twelve miles or fifteen miles, or anything of that kind, or did it include that?

A. No, sir, it didn't. It included general provisions that you will conduct these tests with due [200] regard to public safety.

Q. Now, in reference to public safety, what you are referring to is that the United States Government, operating through this method that you detailed in your direct examination, did not want to cause a catastrophe in any community near the Nevada Proving Grounds. You don't mean they were to discontinue one of the tests if your Committee considered it and then they decided it would break glass windows or crack one or two ceilings in Las Vegas, do you?

A. We could not have made such a determination. One would never have the knowledge that you would break a window or crack plaster in Las Vegas; you just don't have it.

Q. Assuming in some manner that you could have determined that if we go ahead with test 'a' there is a strong possibility that a few houses in Las

(Deposition of Dr. Alvin Cushman Graves.)

Vegas may have some plaster cracks, and maybe one or two stores may have windows crack, is that what you mean by public safety, to ask the Commission to allow you to change the test?

A. No.

Q. What you have in mind then is something that would cause severe damage, maybe injure or kill people, maybe devastate an area to that extent— [201] reduce it to rubble or something of that kind, something in a degree that it would directly or substantially affect the public safety as a group rather than isolated areas?

A. If we would have hurt anybody, any one person we would not fire a shot. If we knew that we would pick up a rock and hit a person on the head with it and crack his skull, we would not have fired it.

Q. You would not have had a way to determine that, would you?

A. No. You asked a hypothetical question—we had no way of finding out, we didn't know we were going to break a window in Las Vegas, so we would just have no way of promoting public safety to the extent of guaranteeing we would never break a window.

Q. I assume that these tests caused not only a certain amount of work but a certain amount of expense, did they not? A. Yes.

Q. Well, in making a particular test, you were endeavoring to get some information you didn't have prior to that time, is that right?

(Deposition of Dr. Alvin Cushman Graves.)

A. Yes.

Q. And either in the manner of firing a shot or in the intensity, that is an increase in the amount [202] of energy you were making some change from the test previously made?

A. Either in intensity——

Q. Or in the manner?

A. Or in the design of the device itself.

Q. And the purpose and intent was to find out what would be the effect of conducting that experiment as to prior experiments?

A. That's right."

Mr. Weisz: And by myself again:

"Q. In practical use of the term public safety, do you mean maintaining limits such that the atomospheric pressures and radioactive fall-outs beyond the test area are kept to a minimum whereby persons or property will not be damaged to the best of your knowledge?

A. That is correct. This does not mean that you will have zero shock wave."

Mr. Weisz: And both of us indicated there was nothing further from that witness.

We will next offer the deposition of Brigadier General Kenneth E. Fields. Have you that deposition before you, Mr. Brett? Do you have that deposition?

Mr. Brett: No. I have only this one.

Mr. Weisz: Can we have General Fields' deposition, [203] please?

Mr. Brett: Mr. Clerk, that is the one I was permitted to open last night and I returned it.

Mr. Weisz: I will state to the Court the deposition of General Fields was received unsigned with a certification from the reporter to the effect that he had made diligent effort to find the deponent. Counsel does not object to that fact——

Mr. Brett: Not to the fact that it is unsigned.

Mr. Weisz: ——in our conversations. However, certain changes, mostly minor, were apparently made at the suggestion of Mr. Gorvine who is from the Office of the General Counsel of the Atomic Energy Commission, and despite the fact that it may render the deposition a little less intelligible, I was wondering as to the propriety of keeping the deposition in its original form rather than with the corrections that were made by Mr. Gorvine.

The Court: Well, of course, as to Mr. Gorvine, no one has any right to make any corrections except the witness, but you are not raising any question with respect to it not being signed?

Mr. Weisz: No, your Honor.

Mr. Brett: As a matter of fact, counsel have discussed it. I would suggest that when we come to the corrections we might indicate them to the Court. I think there are a [204] few exceptions, but in the main they appear to be——

The Court: Typographical?

Mr. Brett: No. The reporter has endorsed the reporter's errors with his initials. Apparently after it has been typed out, he has gone over his notes,

and I conclude in doing so he noted he had made errors. Now, I take it that is what it means.

The Court: Well, that is different. If they are the reporter's errors, then, of course, those corrections may be made. That is just the same as if he torn it up and had retyped it.

Mr. Weisz: Well, there are very few changes and I suggest you can just rule on them as you come to them. I have no objection to leaving them either way, either the original text or the corrected text.

Mr. Brett: If we can indicate to the Court where a change has been made and then your Honor can accept the situation in which you feel the deposition was given, then it will be best.

The Court: All right.

Mr. Brett: May I say, at this time, your Honor, in connection with the last deposition, simply in order that your Honor will have it in mind, and the deposition of Dr. Cox, there is a variance between the two men as to whether or not it was anticipated that these shocks would go into [205] the elevations beyond what is called the troposphere, Dr. Cox saying it wasn't anticipated and this last witness saying it was. Then, there is testimony that will come in by Dr. Cox to the effect that any damage over and beyond certain distances would come through those higher elevations. I merely bring this up so when you reach those points your Honor will have that in mind. Of course, a lot of this is relatively general.

The Court: Very well.

(Whereupon, counsel for the parties read the deposition of Brigadier General Kenneth E. Fields taken on behalf of the defendant as follows:)

Mr. Weisz: This is the direct examination by the Assistant United States Attorney for the District of Nevada.

Mr. Brett: May I further state, your Honor, that no one appeared at the taking of the deposition in behalf of the plaintiff, and both through stipulation and in accordance with a provision of the rules, the plaintiff prepared written interrogatories and you will find those later, and there were submitted answers to the written interrogatories.

DEPOSITION OF BRIG. GEN. K. E. FIELDS

Direct Examination

“Q. Will you please state your name for the record and your rank and assignment?

A. Kenneth E. Fields, Brigadier General, United States Army. I am the Director of the Division of Military Application of the Atomic Energy Commission. This is a [206] statutory position which according to law must be filled by an officer on active military service.

Q. You are assigned to the Atomic Energy Commission? A. Yes.

Q. How long have you held this position, General? A. Since August 21, 1951.

(Deposition of Brig. Gen. Kenneth E. Fields.)

Q. Directing your attention to the months of September, October and November of 1951, what was your principal duty as Director of Military Operations in particular regard to atomic weapons tests in Nevada?

A. I was responsible for the supervision," and here is the first correction. There is the word "and" stricken out.

Mr. Weisz: And as it reads originally:

"and carried on from the Commission headquarters, of the test operations. As such it was my responsibility to recommend the program of the tests and to see to their execution.

"Q. General, you mentioned the program of the tests. Were you the person who was responsible for outlining what tests were to take place? In other words, did you determine how many bombs were to be tested or other weapons and did you determine the size of the weapon to be tested in the initial stage? [207]

A. I was responsible for developing the program on the basis of recommendation of the Los Alamos Laboratory and of the Department of Defense, for securing the necessary judgments of the General Advisory Committee of the Commission, and for making then of my own recommendations to the Commission as to the program that should be carried on in the interest of the furtherance of the weapons program.

This did include considerations of the justification of the different parts of the program, the

(Deposition of Brig. Gen. Kenneth E. Fields.)

costs of them, the advantages to be gained, and the feasibility of conducting the experiments that were proposed at the Nevada test site—Nevada Proving Ground.

Q. And was your recommendation to the Commission subject to Commission approval?

A. Yes.

Q. You mentioned the Nevada Proving Ground. Who determined the location of that proving ground?

A. The Commission in collaboration with the Department of Defense selected the Nevada Proving Ground as the location for a continental test site.

Q. Isn't it a fact, General, that the President of the United States had some part in the determination of the site of this proving ground? [208]

A. I am sure the President was fully aware that atomic tests would be conducted at this proving ground. I believe he actually approved it, but I am not cognizant of it right now. I could check this in the files."

Mr. Brett: I make no objection to the fact it is hearsay.

"Q. When was the choice of the Nevada Proving Ground actually made effective? In other words, when was that proving ground so designated?

A. The proving ground was so designated and established late in 1950.

Q. Did you have any part in the selection of that site personally, General?

(Deposition of Brig. Gen. Kenneth E. Fields.)

A. No, I did not. My predecessor did, though.

Q. Going back to the test in 1951, you have testified that one of the considerations that fell to your responsibility was justification of the program.

In 1951, what was the primary objective of the program of tests conducted at that time?

A. The primary objective was the furtherance of the weapons program in the sense of improving the efficiencies of the weapons, or the developing of new types of weapons. In addition there were some experiments whose purpose was the study of the military effects, [209] locally and close to the point of detonation, of some of the experimental detonations that were to be conducted.

Q. General, would you say that the primary objective was closely related to national defense?

A. Yes. That was the primary objective.

Q. Now, did you say the Commission has any other test site either continental or outside the continental limits of the United States? A. Yes.

Q. Isn't it a fact, General, one of those test sites is outside the United States; far out in the Pacific? A. Yes.

Q. And what is the purpose of having a site located far out in the Pacific?"

Mr. Brett: I would object to that as immaterial, as having no relation whatsoever to this case. I will read the answer, however.

Mr. Weisz: Frankly, your Honor, the question and answer are relatively most unimportant.

The Court: Well, it is immaterial, unless it is a

(Deposition of Brig. Gen. Kenneth E. Fields.)
preliminary question. The objection will be sustained.

“Q. In making the determination to conduct a test in the Pacific rather than at the Nevada Proving [210] Ground, is that determination one of your responsibilities, General?

A. Yes, it is, in the sense that it is my responsibility to recommend to the Commission what should be done.

Q. And in making such a recommendation would you consider the potential blast effect of any device to be tested; that is in making recommendations as to whether such test should be conducted in Nevada or in the Pacific?

A. Yes; along with many other considerations.

Q. If in your judgment the device to be tested would result in a blast effect that might endanger life, limb, or property within the United States, would it be your responsibility to recommend that such test be conducted outside the United States or not at all?

A. It would be my responsibility to make such a recommendation if I considered there was real hazard of such damage.

Q. During the 1951 experiments did you make any recommendation that the test not be conducted at the Nevada Proving Ground? A. No.

Q. In other words, General, in your judgment at that time there was no serious hazard within your [211] knowledge that would result from the test to be conducted? A. That is correct.

(Deposition of Brig. Gen. Kenneth E. Fields.)

Q. Now, going back to the question of justification of the program I ask you what area is the Commission interested in from the standpoint of blast effect for purposes of these tests at the Nevada Proving Ground?

A. The Commission is interested in securing information, or was interested and is, in securing information on the effects of atomic explosions on instrumented structures and equipment within the Nevada Proving Ground. These are all relatively close in to the detonation point.

Q. When you say relatively close in, would that include a radius of over 100 miles?

A. It would not. It would be of the order of miles—it would be several miles.

Q. It would be less than 100 miles that the Commission would be interested in testing?

A. It would be much less.

Q. General, what instructions, if any, emanate from your office to the person in charge of the test at the proving ground concerning public safety?

A. Fundamentally it was his responsibility for [212] firing the specific detonations under the best conditions that could be realized. However, in determining the safety of the public at large—the determination that it is safe to fire this detonation from the standpoint of people”——

Mr. Brett: Now, here again is a correction, but I will read it first as it was originally and then I will read it as corrected:

“from the standpoint of large and great distance

(Deposition of Brig. Gen. Kenneth E. Fields.)

was made in the process of approving the program itself, at which time it was considered.”

Then I will read it as corrected, and this is one in which the reporter’s note says “Reporter’s error.”

“the determination that it is safe to fire this detonation from the standpoint of people located at great distance was made in the process of approving the program itself, at which time it was considered.”

“Q. In other words, General, it was impractical to set up any rigid criteria with reference to safety; such criteria to be followed by the test engineer?

A. It is impractical, too, to set up a catalog of specifics that the test manager would follow in detail in the determination of the time of any specific detonation.

Q. You mentioned the best conditions obtainable [213] for conduct of these tests. Will you tell us some of the factors that enter into the conduct of one of these tests from the standpoint of public safety?

A. The factors are essentially radiation—fall-out of radioactive materials.

Q. If I may interrupt you, General, I meant some of the factors that would effect those dangers. In other words, whether or not weather conditions would affect the dangers of fall-out, blast, etc.?

A. The principal factors are fall-out of radioactive materials, blast heat, and light. Of these the most critical one in the Nevada Proving Ground

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with the limitations we have set on ourselves as to what we will fire there is that of fall-out of radioactive materials. Those are the principal and effects.

Now, what you obtain in those end effects is largely dependent on the weather conditions that prevail at the time; that is, wind velocity and direction, clouds and cloud coverage, and meteorological factors of that sort. Depending upon those the various effects—that is fall-out, and blast, light—are changed in one way or another. For example, under certain conditions, say a very high wind velocity”——

Mr. Brett: I will read it first without the corrections:

“with tall elevations”—I am sorry, your Honor. It [214] is scratched out. I can’t read it, but I will have to read that as corrected, because he says it is the reporter’s error. Apparently he has excised it by erasure, that is the original text. Does your copy show the original text, Mr. Weisz?

Mr. Weisz: No. There was an erasure. I don’t know whether that was done before it was read.

The Court: Well, he has the corrected version as noted by the reporter. Of course, I don’t know that the reporter made these corrections. That is the important thing. If some third person made the corrections, he has no right to make the corrections for the reporter. If the reporter made the corrections, of course, the reporter has the right to make the corrections from his notes.

Mr. Brett: Yes, your Honor.

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The Court: Before he ever presents it to the witness. So I am assuming that the reporter himself made those corrections, is that correct, where you have those notations, "Reporter's error"?

Mr. Brett: I think that where he put in "Reporter's error" it is reasonable to so assume, from the fact that he did not make that notation at other points.

The Court: Well, neither one of you is making a point of that. You are accepting the correction as the correction by the reporter of the reporter's error, is that right? [215]

Mr. Weisz: Yes, your Honor.

Mr. Brett: Yes, your Honor.

The Court: Very well.

Mr. Brett: Now, of course, the corrected version of it reads:

"For example, under certain conditions, say a very high wind velocity at all elevations, and in the same direction, serious fall-out could be obtained at relatively great distance from the detonation point. This is a condition under which we would not fire.

Q. General, are these weather conditions or factors taken into consideration at the initial stage of approval of any test series from Washington?

A. Yes, and, as a matter of fact, basically the prevailing meteorological conditions led to the selection of the Nevada test site. Such factors as precipitation, prevailing wind direction, velocity of wind; all these factors lead to knowledge of the frequency of conditions under which the types of detonations

(Deposition of Brig. Gen. Kenneth E. Fields.)

that we carry on at Nevada can be fired safely. It was the fact that there is a large frequency of such conditions under which detonation can be fired safely that led to the selection of Nevada as the proving ground.

Q. Directing your attention to the objectives of these test series you mentioned—furtherance of the [216] weapons program and development of new types of weapons and improvement of efficiency—do you mean that one of the objectives is to see how big a bomb can be exploded at the proving grounds?

A. No, that was not the objective. The real objective of all of it, of course, is to improve our capability—capability of the United States and”—

Mr. Brett: The original text reads, “its atomic weapons it has in the stockpile.”

Mr. Weisz: There is a correction not initialed, which changes it to read:

“——and the atomic weapons it has in the stockpile.”

It is my opinion it doesn't make any difference, particular difference. Either text is satisfactory to me.

The Court: Very well.

“Q. When you say improvement of efficiency does that include the testing of small devices as much as it would include the testing of larger devices? A. Yes.

Q. When you say development of new types

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would that necessarily mean bigger types of weapons? A. No.

Q. When you say the furtherance of the weapons program did you mean to convey the idea by furtherance [217] of the weapons program it would be to test bigger weapons?

A. Not necessarily. It might be applicable to bigger weapons or smaller weapons. It is improvement in the knowledge of bomb physics. Really to improve design of weapons for one purpose or another.

Q. In all of those tests the concern of the Commission is limited, from the standpoint of the results of the test, is it not limited to the proving ground area?

I am afraid the question isn't very clear. I ask again, General, is it the objective to test the effect of those weapons over an area beyond the proving grounds?

A. There is no purpose, in going forward with a test program in Nevada, aimed at determining the effects of these weapons outside of the test site."

Mr. Brett: And then the words "I don't know" appear and are stricken.

"As a matter of fact it is within the quite small area within the test site itself." And the word "the" is changed to "a", so it reads, "within a quite small area within the test site itself."

"Q. General, from time to time there have been reports appearing in the paper concerning broken

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windows in communities located as much as 75 miles away from the [218] test area.

I ask you whether or not such property damage is anticipated in the conduct of those tests?

A. We know that the possibility exists that the test explosion might cause some minor damage outside the limits of the test site. We take all reasonable precautions to minimize this in selecting the conditions under which we fire.

Q. I think that completes our interrogatories unless there is any point you think we ought to cover or the General thinks we ought to cover."

There was a discussion off the record and then the Assistant United States Attorney resumed:

"General, is it a fact that the Commission actually approves each test series? A. Yes.

Q. And what is the nature of the approval emanating from the Commission?

A. The approval specifies the number of shots, the type of shots, the expected yield of those shots, their method of detonation, the amount of fissionable material that can be expended in them, all those decisions being reached on the basis of consideration of the purposes of the shots and the feasibility of detonating them in the Nevada Proving Ground. [219]

Q. What part, if any, does the President of the United States take in approval of any test series?

A. The President approves the holding of a series of tests, number of shots in it and the amount of fissionable material that will be expended.

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Q. Once this approval has been issued by the Commission and the President, what authority is vested in the test engineer at the Nevada Proving Ground or test site to deviate from the approval as issued?

A. He has no authority to deviate from the approval.

Q. In other words, General, if the approval called for six tower shots and six air shots the test engineer in charge of the testing at the proving ground would not have authority to detonate seven tower shots and five air shots?

A. That is correct. He would not have such authority.

Q. He would not have authority to deviate as to the amount of fissionable material to be used in the series?

A. That is correct. He would not have authority.

Q. And he would not have authority to deviate from the approved yield in any given series? [220]

A. That is correct.

Q. General, could you explain for the record the term 'yield' in layman's terms?

A. Very briefly, when we speak of yield we do so in terms of the equivalent amount of T.N.T. that would give the same explosive power.

"Mr. Stetson: At this time I will ask the Notary to propound the plaintiff's interrogatories to the witness."

Mr. Weisz: Whereupon, the written interrogatories were propounded through the Notary Public

(Deposition of Brig. Gen. Kenneth E. Fields.)

to the witness, and the questions here are the interrogatories.

The Court: I think we will take our afternoon recess.

(Recess.)

Mr. Weisz: Your Honor, continuing with the plaintiff's written interrogatories to this witness, to a great extent this is not cross-examination and I don't care to, as to each question, point out that fact, and I would like to ask counsel, through the Court, whether this was considered as examination in chief or cross-examination?

Mr. Brett: Well, I do not know that I could define it. It is examination. That is the only thing I could say. Of course, I had no knowledge of what the examination in chief would be. This was adduced through my questions of the witness. [221]

The Court: Where was the deposition taken?

Mr. Brett: In Washington, D.C.

The Court: And what arrangements did you have before? Did you have arrangements to submit interrogatories to him?

Mr. Brett: Yes, sir, by stipulation.

The Court: What difference does it make? In other words, you had entered into a stipulation. Of course, what you are doing is a little bit irregular in that he took a deposition and you submitted written interrogatories. Ordinarily the person taking the deposition would submit interrogatories, and cross interrogatories could be submitted and it

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could be taken on interrogatories; or if you were going to take a deposition not on interrogatories, it would be on oral examinations. But you have done it a little differently here and you stipulated. You couldn't get back to Washington, and you entered into a stipulation to submit written interrogatories?

Mr. Weisz: Yes, sir.

The Court: So it is half "fish" and half "fowl." In other words, the United States Attorney was taking the deposition and the plaintiff in the case submitted interrogatories on a stipulation. Obviously, the interrogatories couldn't be cross-examination because you couldn't cross-examine before the examination has taken place. So, I don't know. If you have a stipulation that he could submit those interrogatories, [222] I don't see how you could object, now, to the submission of the interrogatories.

Mr. Weisz: Oh, no, your Honor. I was merely clarifying the point for the purpose of considering that the witness becomes a witness for the plaintiff and not for the defendant.

Mr. Brett: There is no question about that, but under the law he is an adverse witness to the plaintiff and as such we are not bound in the sense that we can't offer contradictory evidence. I have the law on that, if there is any question.

The Court: Well, is there any question that becomes of any importance?

Mr. Weisz: No, your Honor.

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The Court: Then we are wasting a lot of time.

Mr. Weisz: Thank you.

DEPOSITION OF BRIG. GEN. K. E. FIELDS
(Continued)

“Q. In connection with the test series of nuclear explosion experiments which were made at the Nevada Proving Grounds during October and November of 1951, state whether or not each of the following authorizations, proposals, recommendations, reports, or decisions was in writing:

(a) The proposal of the Director of the Los Alamos Scientific Laboratory? A. Yes.

Q. (b) The transmittal of such proposal by and [223] through the Manager of Operations of the Santa Fe Operations Office to the Director of the Division of Military Application in Washington, D. C.? A. Yes.

Q. (c) The transmittal and accompanying recommendation of the Director of the Division of Military Application to the Atomic Energy Commission? A. Yes.

Q. (d) The decision of the Atomic Energy Commission? A. Yes.

Q. (e) The report of the Atomic Energy Commission to the Special Committee on Atomic Energy of the National Security Council?

A. Yes.

Q. (f) The report and recommendation of the National Security Council to the President?

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A. I do not know. There is no record of this in our files; as naturally there would not be.

Q. (g) The President's authorization?

A. Yes.

Q. (h) The authorization and direction of the Atomic Energy Commission to the Test Manager?

A. Yes.

Q. (i) The direction and instructions of [224] the Test Manager? A. Yes."

Mr. Brett: Pardon me, just a minute. I might state, your Honor, that in the original motion for summary judgment and as a part thereof, there was an affidavit of one Walter Williams, who was an official of the Atomic Energy Commission, in which he alleged that these particular steps were taken, and that is the basis under which these questions were asked.

"Q. Two. In respect to those matters referred to in questions 1 (a) to 1 (i), inclusive, as to which you have made affirmative answers, please identify with the designation W1, W2, etc., to the closing consecutive number preceded by 'W' and annex to this deposition true copies of each of said writings which will be marked by the Notary as Exhibits 1 to the closing number consecutively for identification.

A. I respectfully decline to annex these writings on the grounds of privilege, with the exception of the writing referred to as 'd' above, which I am providing herewith with the nomenclature W-5."

Mr. Brett: That (d) above was the decision of

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the Atomic Energy Commission and annexed to the deposition in this statement:

“At Meeting 608 on September 26, 1951, the Commission approved the recommendation of AEC 446/16. [225]

“ROY B. SNAPP,
“Secretary.”

“Q. Three. If any of such writings contain restricted data as defined in Title 42 U. S. Code, Sections 1810 (a) and 1810 (b) (1), and such restrictions cannot be waived, make an express statement to such effect and identify and annex as exhibits for identification in the same manner as described in Question 2, copies of such documents from which such restricted data is deleted, or in the alternative, summaries of the general contents of each of such documents as so deleted but as to include identification and description of these particulars:

(1) The originator and recipient; (2) the date; (3) the respects, if any, in which any reference is made to, directions are given as to, or control is exercised over any function, duty or action of the agents of the United States who were finally authorized and directed to conduct the tests of the nuclear weapons which were exploded at the Nevada Proving Grounds during October and November of 1951.

A. As I answered No. 2, there are restrictions that cannot be waived with respect to all the writ-

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ings with the exception of that reference in 'd' in
Question 1. [226]

I am supplying summaries of the general contents of writings with reference to the various papers of Question 1 with the exception of 'f' on which I have previously stated I am not informed."

Mr. Brett: In order to make this intelligible, 'f' was the report and recommendation of the National Security Council to the President, as to which he said he did not know, "There is no record of this in our files; as naturally there would not be."

Then there are annexed to this deposition the following documents:

As to W-1, which was the proposal of the Director of Los Alamos Scientific Laboratory, it states,

"Originator: Norris E. Bradbury, Scientific Director, LASL," which I assume refers to the Los Alamos Scientific Laboratory.

Mr. Weisz: Scientific Laboratory.

Mr. Brett: Scientific Laboratory.

"Recipient: Brigadier General James McCormack, Director, DMA, AEC," and that means Division of Military Application, AEC.

"Date: August 17, 1951.

"This letter forwarded via Carroll L. Tyler, Manager, Santa Fe Operations. The letter dealt with design and justification for each of the items LASL proposed [227] for testing."

W-2 is in response to (b), which was "The transmittal of such proposal by and through the Manager of operations of the Santa Fe Operations Office to

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the Division of Military Application in Washington, D.C." It states, "Same as W-1. Carroll L. Tyler signed letter in customary manner to indicate that it had been forwarded through his office.

W-3 refers to (c), which was the transmittal and accompanying recommendation of the Director of the Division of Military Application to the Atomic Energy Commission. It reads:

"Originator: Director, Division of Military Application

"Recipient: AEC Commissioners

"Date: September 7, 1955."

Mr. Brett: I feel certain, your Honor, that must be a mistyping.

The Court: It has to be.

Mr. Brett: Sir?

The Court: It has to be.

Mr. Brett: Yes. And if counsel will stipulate, I will stipulate that it may be amended to read "51."

Mr. Weisz: I will be happy to so stipulate.

Mr. Brett: I will give it to the clerk later to correct it according to the stipulation.

"This report AEC 446/13 is classified Secret and contains [228] the Division of Military Application Director's recommendation that the Commission approve the program submitted by the Director, LASL.

"This program when approved by the Commission established the purpose of each shot, the num-

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ber of shots, method of detonation, and the expected yield." W-4 apparently refers to (c):

"The transmittal and accompanying recommendation of the Director of the Division of Military Application to the Atomic Energy Commission."

It reads as follows:

"Originator: Director, Division of Military Application

"Recipient: AEC Commissioners

"Date: September 25, 1951

"This report AEC 446/16 contains the Division of Military Application Director's recommendations that the Commissioners approve the expenditure of the required nuclear material for the test series and approve dispatch of appropriate correspondence to obtain Presidential approval of the number of shots and expenditure of material. It is classified Top Secret."

W-6 refers to (e), which reads,

"The report of the Atomic Energy Commission to [229] the Special Committee on Atomic Energy of the National Security Council."

It reads:

"Originator: Gordon Dean, Chairman, Atomic Energy Commission

"Recipient: James S. Lay, Executive Secretary, National Security Council

"Date: October 2, 1951

"This Top Secret memorandum outlined in broad terms the objectives of the test series and requested authority for firing the specific number of shots

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composing the test and to expend certain amounts of fissionable materials.

“This memorandum upon approval by the President established the number of nuclear shots to be fired at the Nevada Test Site during the period October 15, 1951, to about December 3, 1951, and the amounts of materials which could be expended.”

Mr. Brett: W-7 refers to (g), which reads

“The President’s authorization”

It reads:

“Originator: James S. Lay, Jr., Executive Secretary, NSC

“Recipients: The Secretary of State, the Secretary of Defense, and the Chairman, AEC [230]

“Date: October 9, 1951

“This Top Secret Memorandum forwards to the recipients Presidential approval of the specific number of shots to be fired in the period October 15, 1951, to about December 3, 1951, and approves the expenditure of specified amounts of material.

“It limits the number of shots to be fired and the amounts of materials to be expended.”

Mr. Brett: W-8 is in reply to (h), which reads

“The authorization and direction of the Atomic Energy Commission to Test Manager.”

It reads as follows:

“Originator: M. W. Boyer, General Manager, AEC

“Recipient: Carroll L. Tyler, Manager, SFO,” which apparently refers to Santa Fe Operations Office,

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“Date: September 20, 1951,” apparently prior to these other documents.

“This secret memorandum designated Tyler as the responsible officer of the AEC for the conduct of the Atomic test operation during the period October 15, 1951, to about December 3, 1951, and vested in Tyler over-all responsibility for the operation and stated this responsibility could not be redelegated.

“Tyler’s responsibilities under the above authority included, but were not limited to; the security of the [231] test operation; radiological safety, both operational and public in the local area; public information; obtaining military support and the conduct of observer programs.”

Mr. Brett: W-9 referred to (h), which reads,

“The authorization and direction of the Atomic Energy Commission to the Test Manager.”

It reads:

“Originator: M. W. Boyer, General Manager, AEC

“Recipient: Carroll L. Tyler, Manager, SFO

“Date: October 12, 1951.

“This Secret Teletype gave the Test Commander (Tyler) overriding operational authority for the purpose of making minor changes necessitated by operational conditions.”

And W-10 is in reference to question (i):

“The directions and instructions of the Test Manager.”

(Deposition of Brig. Gen. Kenneth E. Fields.)

It reads:

“Originator: Alvin C. Graves, LASL

“Date: August 25, 1951

“Recipients: Various Components of the Test Organization

“This secret document set forth the mission of the Test Organization and its various components, specified [232] communication channels, outlined administrative methods to be followed and established the sequence of firing the test devices, and the approximate date and time of firing. The Annexes thereto outlined the specific procedures for firing each shot and provided a detailed schedule of functions to be performed during specified periods prior to, and following each shot, including ground level monitoring of radio-activity up to a radius of some 200 miles from the test site.”

Mr. Weisz:

“Q. Four. State whether or not the authorization of the President for the conducting of the test series of nuclear explosions at the Nevada Proving Grounds during October and November of 1951, included: (a) a statement of the general purpose of the experiment?

A. No.

Q. (b) The number of detonations which were to be made? A. Yes.

Q. (c) The approximate date when the experiments were to begin? A. Yes.

Q. (d) The approximate amount of fissionable material to be consumed? [233] A. Yes.

(Deposition of Brig. Gen. Kenneth E. Fields.)

Q. (e) The estimated explosive force to be released? A. No.

Q. (f) The characteristics of the device or devices to be tested? A. No.

Q. (g) The conditions under which the detonations were to be made? A. No.

Q. Five. Is it true during October and November of 1951 there was no prescription by authority above the Test Manager of general conditions which were to govern such detonations?

A. As I have said in answer to previous questions, the general conditions were considered in the various reviews and approval given at levels above the Test Manager both with respect to the selection of Nevada as the test site and in the review of the specifics of the proposed program of tests for this test series.

In those considerations there is involved the review of the types of devices proposed and approved, the manner of detonation, and such"——

Mr. Brett: Originally it reads, "and such factors which bear on all the other general conditions under which detonation [234] at Nevada will be held."

As amended, without any statement other than the initials of the reporter, it reads:

"and such other factors which bear on the general conditions under which detonation at Nevada will be held.

"Q. Six. Was there any discretionary authority vested in the Test Manager to deviate from, change

(Deposition of Brig. Gen. Kenneth E. Fields.)

or modify the specified matters contained in the President's authorization? A. No.

Q. Seven. If you have answered Question 6 affirmatively, detail such discretionary authority.

A. I answered it negatively.

Q. Eight. Was there any discretionary authority vested in any agent of the United States having lesser authority than the Test Manager to deviate from, change or modify the specified matters contained in the President's authorization?

A. No.

Q. Nine. If you have answered affirmatively, state in whom such discretionary authority was vested and detail such discretionary authority.

A. I answer in the negative.

Q. Ten. Did the Test Manager or any other agent [235] of the United States having lesser authority and who actually participated in the nuclear detonation tests at the Nevada Proving Ground during October and November of 1951 have any different or greater discretion in performing such experiments pursuant to the terms of the President's authorization than that of an Army truck driver who was ordered to deliver material from one point to another and whose orders included: (a) the location of the destination; (b) the designation of the conveyance to be used; (c) the designation of the material to be transported; (d) the route to be followed; (e) the speed limits to be observed and (f) approximate time when the service was to be performed?

(Deposition of Brig. Gen. Kenneth E. Fields.)

A. Insofar as the specifics of the approvals by the President and the Commission are concerned, the Test Manager had no authority to deviate therefrom.

I don't consider myself competent to say that the Test Manager is or is not analogous legally to an Army truck driver although I have never considered that the Test Manager could be construed to be a truck driver in that sense.

Q. Eleven. If you have answered Question 10 affirmatively, state what additional different discretionary rights they had and in whom such [236] discretionary rights were vested."

Mr. Brett: Now, again there is a correction, and I will read it both ways:

"A. I am a little lost how to answer that question. I am not sure my answer is affirmative, or positive." And it was corrected to read:

"I am a little lost how to answer that question. I am not sure my answer is completely affirmative, or negative."

"Q. Twelve. Is it true that the experiments conducted between October 22, 1951, and November 5, 1951, consisted, in part, of detonating weapons containing fissionable and radio-active materials with the intent and purpose of creating and causing blast waves and air shock waves which would reach into and bounce or rebound from atmospheric layer elevations which surround the earth and which are defined as (1) the Troposphere, an air mass layer within the area from the earth's surface to an ele-

(Deposition of Brig. Gen. Kenneth E. Fields.)

vation of six miles; (2) the Ozonosphere, an air mass layer between 25 and 40 miles above the earth's surface and (3) the Ionosphere, an air mass layer 50 or more miles above the earth? A. No.

Q. Thirteen. If your answer is in the [237] negative what was the intent and purpose of such experiments?

A. The purpose of the experiments conducted between October 22, 1951, and November 5, 1951, was twofold: Some tests were conducted for research and development purposes to secure information needed for the design of new and improved weapons; others were conducted to secure information on the effects of atomic explosions on instrumented structures and equipment within the Nevada Proving Grounds.

None of the tests had as their purpose the creation of shock waves which would rebound from the atmosphere.

Q. Fourteen. Is it true that the United States, through previous experiments made by the Atomic Energy Commission, knew that these shock waves which it intended to create through such explosions were capable of extreme, erratic and uncontrollable destruction and property damage for hundreds of miles; that similar, though not necessarily the same intensity of, explosive tests had caused widespread damage for which it had assumed liability in reports to Congress and for which Congress had appropriated funds for payment?

(Deposition of Brig. Gen. Kenneth E. Fields.)

A. As I answered in Question 13, the purpose of those experiments or their intent was not to create shock waves, but rather that of research and development.

However, from previous tests the Commission knew [238] that the possibility existed that a test explosion might cause some minor blast damage outside the limits of the Nevada Proving Ground. The Commission has in the past made administrative settlement, under authority contained in the Federal Tort Claim Act, of a number of property damage claims not in excess of \$1,000.

I would not characterize the test explosions, however, as being capable of 'widespread damage' and 'extreme erratic and uncontrollable destruction and property damage for hundreds of miles.'

Q. Fifteen. If your answer is in the negative what was the intent and purpose of such experiments?

A. I think I have already answered that in answer to Question 13.

Generally, the purpose was that of research and development aimed toward the design of new and improved weapons and securing of effects" and the word "and" is stricken out,

—"information on the specific structures and equipment within the Nevada Proving Ground.

Q. Sixteen. Is it true that the United States through the Atomic Energy Commission conducted such experiments and detonated such extremely high explosives for the deliberate purpose of determining

(Deposition of Brig. Gen. Kenneth E. Fields.)

how far, to what extent, and in what manner damage [239] and destruction would be caused thereby?

A. No, it is not.

Q. Seventeen. If your answer is in the negative what was the intent and purpose of such experiments?

A. Well, again, it is the same answer as 13.

I would like to emphasize,"

It says "that, however," and it has been changed to "however, that weapons effects tests are designed to secure information pertaining to the effects on specific structures and equipment within the test site and close to the point of detonation, but never to cause property damage outside the test site or to test the effects of those devices outside the test site.

"Q. Eighteen. It is reported in the Commission's official report dated January, 1953, and entitled, 'Assuring Public Safety in Continental Weapons Tests' at Page 88, in Footnote 4, that 353 claim for cracked plaster inside or cracked stucco outside of private properties were filed with the AEC and approved and paid by it under the Tort Claims Act and that such claims resulted from the nuclear test detonations made at the Nevada Proving Grounds during January-February, 1951, and during October-November, 1951.

Were such claims and payment thereof [240] reported to the Congress in writing?

A. Yes.

Q. Nineteen. If you have answered affirmatively annex a true copy of such report or reports; mark

(Deposition of Brig. Gen. Kenneth E. Fields.)

them with the initial W and the next consecutive number and the Notary will mark them with the next consecutive number as an exhibit.”

Mr. Brett: The deposition then shows this language:

“Thereupon, document headed W-11 was marked Exhibit No. 11 for identification, consisting of 16 sheets.”

It is very long, Judge. It consists of large number of claims, and we offer that exhibit as Plaintiff's Exhibit No. 38, I believe it is, our next number in evidence. It consists of a report to Congress and a list of claims paid.

The Court: It will be received.

(Said documents were received in evidence as Plaintiff's Exhibit No. 38.)

Mr. Weisz:

“Q. Twenty. In performing your duties as Deputy General Manager of AEC”—

And for the purpose of clarification, your Honor, we originally were taking this deposition, as I think counsel stated, of the Deputy General Manager. I am sorry. He has left the Commission and we then engaged in another stipulation [241] for the deposition of General Fields as a substitute, but the interrogatories weren't changed, it becomes quite clear.

“In performing your duties as Deputy General Manager of AEC, have you been informed of the contents of all reports of the Commission to the

(Deposition of Brig. Gen. Kenneth E. Fields.)

Congress of claims made against it for damages claimed to have arisen out of its testing of nuclear weapons at the Nevada Proving Grounds made between January of 1951 and this date?"

Now, I will read the reply of General Fields:

"A. As I have testified previously, I am not Deputy General Manager but the Director of Military Application. In this position I am generally aware of the claims for damages arising out of the testing operations at the Nevada Proving Grounds.

Q. Twenty-one. Aside from the claim out of which this lawsuit arises and in which such defense has been made, do you know of any instance in which AEC rejected and disallowed a claim for damages under the Tort Claims Act arising from the nuclear detonation test at the Nevada Proving Ground upon the ground that the United States through its agents was exercising a discretionary function or duty?

A. In exercising its authority to make administrative settlement of claims not in excess of [242] \$1,000, the Atomic Energy Commission has not to my knowledge rejected a claim"—

Mr. Brett: It originally read "attesting," but the reporter says it is error and it was corrected to read,

"for test damage upon the grounds that the United States through its agent was exercising or performing a discretionary function or duty.

"Q. Twenty-two. If your answer is in the affir-

(Deposition of Brig. Gen. Kenneth E. Fields.)

mative briefly state the nature of the claim, the name of the claimant and the defenses asserted.

A. My answer was in the negative.

Q. Twenty-three. Limiting your reply to the exercise or performance of discretionary functions or duties, was there any difference between the tests made at the Nevada Proving Ground on any or either of the following dates: October 21, 28, and 30, 1951; November 1, 5, 19, and 29, 1951?

A. No.

Q. Twenty-four. If you have answered Question 23 affirmatively state and describe such differences.

A. Well, I answered it negatively."

Mr. Weisz: No further questions were asked.

We would like now to turn to the deposition of Dr. Everett Cox. [243]

Mr. Brett: May I at this time, again direct the clerk's attention, that this last exhibit annexed to those documents, which is W-11 is the one that was received in evidence as Exhibit 38?

(The deposition of Dr. Everett Cox, a witness on behalf of the defendant, was read by counsel for the parties as follows:)

DEPOSITION OF DR. EVERETT COX

Mr. Weisz: Direct examination by myself:

"Q. Would you state your full name, please?

A. Everett Franklin Cox.

Q. And your address, please?

A. Home address?

(Deposition of Dr. Everett Cox.)

Q. Well, whichever one is fitting at the moment.

A. 810 Hermosa Drive, Northeast, Albuquerque, New Mexico."

The Court: Excuse me, for a minute. Is this about as long as the last one?

Mr. Brett: Yes, it is, your Honor.

Mr. Weisz: This is a much longer one, your Honor.

Mr. Brett: I think it is longer than that other one.

Mr. Weisz: It is 60 pages. And we have another one, besides.

Mr. Brett: And I will have a little rebuttal to one of them, Mr. Bruner's testimony.

The Court: Suppose we continue to about five minutes [244] of 4:00 and then we will recess until morning.

Mr. Weisz:

"Q. And where are you employed, now?

A. By the Sandia Corporation, also at Albuquerque.

Q. And can you tell us very briefly what the Sandia Corporation is and does?

A. The Sandia Corporation is an ordnance laboratory and development organization for the Atomic Energy Commission.

Q. In other words, is it a scientific group working on nuclear weapons?

A. Essentially correct.

Q. And what is your position with the Sandia Corporation, please?

A. I am a Department Manager within the research organization; my particular department is called the Weapons Effects Department.

Q. And in what particular field of science do you work, sir?

A. Essentially all the fields related to weapons effects, although my personal specialty has been mostly in the field of blast. Whether it is called blast or acoustics is a matter of degree.

Q. And where were you educated, Dr. Cox?

A. My Bachelors Degree with a major in [245] physics was at Miami University at Oxford, Ohio. My Doctorate in Philosophy with a major in Physics and Math is from California Institute of Technology at Pasadena.

Q. And when did you receive your doctorate, Dr. Cox? A. 1933.

Q. And can you give us briefly your professional experience since then?

A. Associate Professor of Physics at Colgate University, that was 1933 to 1939; then Assistant Director of the Buhl Planetarium, and Institute of Popular Science, Pittsburgh; that was essentially one year; then with the Navy Bureau of Ordnance, in Washington, and Pearl Harbor for two years; then to the Naval Ordnance Laboratory in Washington and Silver Springs, Maryland until 1948, and at Sandia Corporation since that time.

Q. And since when have you specialized, if you have, in the field of blast effects?

(Deposition of Dr. Everett Cox.)

A. My first experience with that, I believe, was October of 1946.

Q. And have you been working in the field since 1946?

A. Periodically, not continuously in that one field, but it certainly has been of interest to me since that time and I have published several [246] articles in the intervening time.

Q. Do you belong to any professional associations?

A. Several.

Q. What are they, please?

A. At the present time, the American Physical Society of which I am a Fellow, and the American Meteorological Society, of which I am a professional member.

Q. And you state you have published articles in the field of blast effects?

A. Right, in—oh, quite a number of different journals.

Q. Which journals?

A. The Acoustical Society of America; Bulletin of the American Meteorological Society, and the Journal of the American Meteorological Society; American Journal of Physics; Scientific American.

Q. That was a paid article, I presume?

A. Yes. And a chapter in a fifty-nine volume encyclopedia, Handbuch der Physik.

Q. This Handbuch der Physik is a German publication, which is what?

A. The Handbuch der Physik is a relatively old encyclopedia of Physics and they are now re-doing

(Deposition of Dr. Everett Cox.)

the thing from beginning to end; I believe it is fifty-eight or fifty-nine volumes. [247]

“By Mr. Brett: This simply means a Handbook of Physics, does it?”

A. Except to distinguish it from the engineering term, the translation is ‘Encyclopedia of Physics.’

Q. Now, the field in which you worked, this blast effect, you called it, is that a relatively new one?

A. No. Whenever there has been an accidental explosion, going back to whenever TNT was first invented or before, there has been scientific curiosity with what has occurred; but as far as making a scientific study, it’s been a relatively active field only since 1900.

Q. Prior to 1900 it was merely a matter of phenomenology, I suppose?

A. Largely phenomenology.

Q. What type of phenomena were observed?

A. Oh, sounds going only in one direction, or predominantly in one direction; or skipping over an area, then striking some place further out, phenomena of that nature.”

The Court: We will recess until 9:45 tomorrow morning.

(Whereupon a recess was taken until the following day, Thursday, May 12, 1955, at 9:45 a. m.) [248]

Thursday, May 12, 1955—9:45 A.M.

The Clerk: No. 14,795-WB Civil, Bartholomae Corporation versus the United States for further trial.

Mr. Brett: Ready, your Honor. Before we proceed with the deposition, I would like to ask, if I may, that you would set aside our submission of my case in chief, for the single purpose of permitting me to offer in evidence this map of Nevada, as Plaintiff's Exhibit No. 1. I find that I overlooked doing that. I would like to have that received in evidence.

The Court: Very well. That will be received in evidence.

Mr. Brett: Thank you.

The Clerk: It is marked as Exhibit No. 1.

The Court: All right. It will be received as No. 1.

(Said map was received into evidence as Plaintiff's Exhibit No. 1.)

Mr. Weisz: May we continue the reading of the deposition, your Honor?

The Court: Yes.

Mr. Brett: May I have the original, please, Mr. Clerk. It is the Cox deposition.

Mr. Weisz: Page 5, line 24.

Mr. Brett: Page 5, line 24, that is right. [251]

Mr. Weisz: I will start one question back to get the continuity. Line 20, page 5:

(Further reading of the deposition of Dr. Everett Cox, a defendant's witness, was continued by counsel for the parties as follows:)

DEPOSITION OF DR. EVERETT COX
(Continued)

“Q. What type of phenomena were observed?

A. Oh, sounds going only in one direction, or predominantly in one direction; or skipping over an area, then striking some place further out; phenomena of that nature.

Q. And these have been observed in the past but there had not been any research as to the cause or effect? A. Generally not.

Q. And in this field in which you are engaged now a popular one; are there many men in the field today?

A. No. I would guess there are possibly six or eight people that have very much real interest in the field.

Q. Was it a practical field prior to the present time?

A. Only to the extent that proving grounds for Army and Navy weapons, such as Aberdeen Proving Ground [252] and the Dahlgren Proving Ground, have had a few experiences with blast claims from out-of-the-way places, and so they have had a bit of curiosity as to what brought on the damage at those places.

Q. Now, in your work, where do you fit in, then, in your field, with regard to the atomic testing that goes on in Nevada; what are your duties?

A. Have you, as yet, had explained the Test organization?

Q. No.

A. In the Test Manager's organization, starting

(Deposition of Dr. Everett Cox.)

with at least the second series of nuclear shots, (I was not present on the first series of shots) they have had me as the specialist in blasts.

Q. Now, when was the second series?

A. That was the October-November series of 1951.

Q. And in your function there, what do you actually do?

A. My job is to predict, as best I can, from the weather forecast, whether damaging blasts will strike any inhabited localities; and then, in addition, for the blast that cannot be computed from known weather information, to attempt to predict by use of high explosives what the blast pressures will be at great distances. [253]

Q. Now, let's go back for a moment, to actually what happens—what causes a blast effect; or what is blast effect, can you tell us that?

A. Well, very near an explosion of any sort, whether it be nuclear or TNT, or any kind of explosion, the blast wave tries to start out spherically; but if the explosion is on the ground or on a relatively low tower, or even an air burst, the part of the blast that strikes the ground is reflected. If you have a tower, the blast wave is first expanding spherically. When it strikes the ground you have a second part of a spherical front starting from the mirror image of the shot point below the ground."

Mr. Weisz: Then there is an observation by Mr. Brett:

"Mr. Weisz, I think, in view of the nature of this

(Deposition of Dr. Everett Cox.)

testimony, we would be fairer to the doctor, and all concerned, if he signs this. He is talking about something the rest of us know very little about. I would like to have it signed."

Mr. Brett: That is right.

Mr. Weisz (Continuing):

"Q. Now, we were at the point at which we have most of our initial sphere which emanates from the explosive point proceeding outward, and another part of it which has been reflected from the [254] ground.

A. Yes, and the two of them essentially join together to become a large hemisphere. If the atmosphere were perfectly uniform, no change in temperature or winds, then the hemisphere would proceed to get larger, larger, larger and the concentration of blast energy would go down essentially as the square of the distance; twice as far away, one-fourth as great energy concentration; three times as far away, one-ninth, and so forth. Now, if the atmosphere is not uniform in temperature and has winds, then the energy becomes concentrated in certain areas on this sphere; part of the energy that belongs on one side ends up on the other side. It is my job to use the weather data that we have and attempt to predict how much this concentration will be, and whether it will come back down and strike the ground.

Q. Then, from your last statement, am I correct in stating that we can have reflection of these blast

(Deposition of Dr. Everett Cox.)

waves back to the ground after they have risen up towards the atmosphere?"

Mr. Brett: In the corrected original, Mr. Weisz, it says "up in the atmosphere."

Mr. Weisz (Continuing):

"A. Bending is a more proper term than [255] reflection. They are bent down to the ground rather than reflected down. It's a gradual curvature rather than a bump and return.

Q. Now, these waves which produce the blast effect, what sort of waves are they? Are they sound waves or what?

A. There's a very tiny difference between what is called a blast wave and a sound wave. It's simply a matter of degree. A shock wave ordinarily has significant pressure, and a sound wave has insignificant pressure, and there is no very clear-cut boundary between significance and insignificance. If a pressure of two or three pounds is present per square inch, we invariably call that a shock wave; if a pressure of 1/1000 or 1/10,000 of a pound per square inch is present, we refer to that as a sound wave.

Q. But the waves are essentially similar?

A. Very similar. The shock wave usually contains one compression or over-pressure, and one rarefaction; an acoustic wave usually contains many.

Q. Dr. Cox, at what point is there this bending of those waves that you have mentioned in the atmosphere? [256]

A. Well, it takes place only as a result of a non-uniform atmosphere, so where the bending occurs

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depends on the temperature and wind structure of the atmosphere. The bending starts essentially immediately at the source and continues from then on, depending on the temperature and wind structure of the atmosphere.

Q. Do we ever have a uniform atmosphere?

A. Small sections of it might be regarded as uniform, but only very small sections.

Q. In other words, in the normal course of events, with regard to all types of waves, including sound waves, there is this bending that takes place?

A. Right.

Q. Are there points in the atmosphere at which more bending takes place than at others?

A. Yes, and here again, this depends entirely on the particular atmospheric structure. A typical atmosphere gets colder as you go up in altitude. However, in the desert country, particularly in the early morning, it is frequently warmer one or two thousand feet above the ground than it is down on the ground, so that causes considerable bending and returning of the waves, sound waves, to earth; then [257] the atmosphere proceeds to get colder with altitude until we reach what is called the tropopause six to eight miles above the ground; then we have essentially uniform temperature up to about twenty miles and then it starts to get warm again. It comes up to about ground temperature at thirty-five miles altitude; then it drops off again to about sixty to eighty degrees below zero centigrade; then it warms up again up to a hundred miles, so there

(Deposition of Dr. Everett Cox.)

are those layers that give us particular bending to sound.

Q. Can we say, Dr. Cox, that when the waves, the sound or blast waves, hit the first layer you mentioned at one or two thousand feet, that the other waves will not go through, that some will not go through or out, will they work out?"

Mr. Brett: Mr. Weisz, in this original text the question reads as follows. Since you don't have it that way, with the court's permission, I will read it. Part of it is stricken out:

"Q. Can we say, Dr. Cox, that when the waves, the sound or blast waves, hit the first layer you mentioned at one or two thousand feet, that some will not go through or out? Will they work out?" And I am now reading Dr. Cox's answer:

"A. Depending on the temperature of that [258] layer compared with the temperature at the ground, a very small fraction of the energy that would normally proceed directly out is bent down; in a typical case, it would hold perhaps one-tenth of the energy at the low levels——

Q. At the low levels only one-tenth of the energy——

A. ——would be held in a typical case; the other nine-tenths would escape and go up.

Q. It is not held; it is reflected?

A. It is bent down and strikes the ground; and then it is reflected and then bent down again, and it is thus held in this low level.

Q. Just for clarity, Dr. Cox, would you draw

(Deposition of Dr. Everett Cox.)

us graphically, what happens on that? Is that capable of graphic representation?"

Mr. Brett: Pardon my delay, your Honor. In the text of the original deposition, on line 16, it states: "Graph drawn by witness," but there is no graph annexed to it.

Do you have such a graph?

Mr. Weisz: No. What happened there, counsel may recall, we got a better representation in printed matter that Dr. Cox sent us.

Mr. Brett: I merely make that statement so that your Honor will understand that there is no such graph annexed here. [259]

Mr. Weisz (Reading):

"Q. Dr. Cox, you have drawn for us two representations, and you have now handed me a printed matter consisting of some pages, ninety-five through a hundred and three; it states on its face that it is reprinted from the Bulletin of the American Meteorological Society, Vol. 35, No. 3, March, 1954, pp. 95-103, in which figure one and figure two, which appear on pages 97 and 98, are the graphic representations that you have drawn just heretofore in a slightly more refined form. I will offer that document as Defendant's B for identification."

And it was so marked.

Mr. Brett: I had failed to recall that, Mr. Weisz.

That is not the doctor's answer. And I see that there is such a document annexed to the deposition, marked Exhibit B.

(Deposition of Dr. Everett Cox.)

Mr. Weisz (Reading):

“Q. Now, Dr. Cox, on the refraction of the type that we have just been discussing at the one and two thousand feet altitude, is there a loss of the energy contained in these waves in the traveling?

A. There is some loss due to absorption of energy in the air, and there is considerable loss from the multitude of reflections. Those are the only losses in energy; but the concentration [260] of energy, which is the thing that might do damage, contracts directly with distance; the concentration is reduced directly with distance—twice as far away, one-half the concentration of energy, and so on.

Q. And can you calculate, knowing the yield, the relation of energy to be expected from any type of detonation? What would be the maximum energy at any time along this reflected pattern?”

Mr. Brett: And then I asked:

“You mean accurately or an estimate?

“The Witness: I can calculate it on the assumption that the data that I have is up to the minute data.”

Mr. Brett: Pardon me, counsel. I did not properly interpret a writing that is on here. Apparently it was merely placing letters in their proper place, so the answer was as follows, your Honor:

“I can calculate it on the assumption that the weather data that I have is up to the minute data.”

Mr. Weisz (Reading):

“Q. And how close can you calculate? How

(Deposition of Dr. Everett Cox.)

close have you been able to check your calculations prior"——

Then there is an interjection by Mr. Brett: [261]

"I will have to object. As yet there has been no foundation laid for that, and I think that calls for a conclusion of the witness."

Whereupon I continued:

"Q. Now, Dr. Cox, you state that you have been involved on the blast effect in the Atomic test series since October of 1951; is that correct, sir?

A. Actually, since about August of that year when we started preliminary experiments.

Q. And have you been engaged in the atomic testing since August of 1951?

A. All of those here in Nevada, yes.

Q. Can you tell us about how many such demonstrations have taken place?"

Mr. Brett: Now, at this time I am going to ask the court to take note that the deposition was taken the 12th of February, 1955. I am now reading Dr. Cox's answer:

"A. Twenty-six, I believe.

Q. Now, has it been your duty, or function, in each of these twenty-six to, prior to blasts, predict blast pressures as they emanate from the source?

A. To sections off of the test site, yes.

Q. Then you do predict, prior to blasts, what the blast effect will be at various points?

A. Yes, I attempt to predict what the blast [262] pressures will be.

Q. And during these series, have you had instru-

(Deposition of Dr. Everett Cox.)

ments to determine what the blast pressures actually are after the demonstration has taken place, at these various points?

A. During each of the series, I have had a finite number of instruments to so determine.

Q. And have your predictions been borne out by the instruments you use?

A. I actually give several predictions. I give a prediction from the weather prediction, and if the weather prediction has been bad, then my prediction, based on the weather prediction, is nothing to brag about. Then I give another prediction based upon a weather balloon sounding; now, depending again on the time of the release of that balloon, and assuming that the weather stays exactly the same between the time the balloon sounding is made and our shot, my prediction is good or bad; when the weather has stayed the same my predictions are good; when the weather is changing rapidly I sometimes get fouled up by, oh—perhaps a factor of two or sometimes a factor of three.

Q. What do you mean by 'factor of two'?

A. If I have predicted a certain pressure [263] level, we will miss that pressure level; the actual pressure may be twice as large or one-half as large, a factor of two.

Q. Now, therefore, your predictions, or the accuracy of your predictions, are dependent upon the weather information that you have and the consistency of the weather between the time you get

(Deposition of Dr. Everett Cox.)

the information and the time the shot or detonation takes place, is that right?

A. That is right.

Q. Are you able to tell when the weather has changed other than by the fact that your prediction is not borne out?

A. I think we should introduce here a set of experiments that we perform immediately before the nuclear shot. At the time of the particular series in October and November of 1951, we fired"—

Mr. Brett: And then I interrupted, and I stated:

"Just a minute. I think that the other question can be answered first 'yes' or 'no.' "

The question previously stated was read by the reporter, and I am now reading Dr. Cox's reply:

"A. That depends entirely on the number and frequency of weather balloon flights."

Mr. Brett: Now, I think we might make that clear and [264] read the question again back on page 14.

Mr. Weisz (Reading):

"Q. Are you able to tell when the weather has changed other than by the fact that your prediction is not borne out?"

Mr. Brett: And the answer is:

"That depends entirely on the number and frequency of weather balloon flights.

Q. Have you had sufficient information in the past so that you can tell that your predictions are accurate within at least a certain degree if the

(Deposition of Dr. Everett Cox.)

weather conditions are as you had expected them to be when making the prediction?

A. In most instances, yes.

Q. Now, how great a degree of accuracy do you have?"

Mr. Brett: I objected, if the court please:

"Is this based upon the same statement you made a minute ago? This is ambiguous in that your previous question was laid upon the foundation that the weather would remain constant."

Mr. Weisz said, "Right."

And I said, "Now, if that is the purport of this question, he would have to answer one way or the other"——

Mr. Weisz (Reading): [265]

"Q. Now, assume that the weather is constant such that your prediction is on the actual fact at the time the shot is detonated. How accurate is your prediction upon these low level refractive phenomena?

A. In general, better than twenty-five per cent. In general, my error is less than twenty-five per cent.

Q. Now, can you tell us, with regard to the low level refraction, at what point the blast effect reaches a point at which no damage to property will occur?"

Mr. Brett: At that time I made this objection:

"Again I will have to object on the ground that there has been no foundation laid for the witness to answer that, and that also it is too general and

(Deposition of Dr. Everett Cox.)

ambiguous; it might refer to a number of things.”

Mr. Weisz (Reading):

“Q. Dr. Cox, can you tell from your background and experience what types of property are most sensitive to blast effect—blast pressures?

A. To the best of my knowledge, the large plate glass show windows, such as those in Las Vegas, are the most sensitive of the structures.

Q. They will react to the blast pressures more in your opinion, than any other type of [266] structure or structural member?

A. To the best of my knowledge.”

Mr. Brett: I then made this statement:

“I still would object. I don’t think you have shown a foundation where he would have the basis to form that conclusion. I don’t think that is in his line of work as you have given it as yet. There has been no proper foundation laid for that answer.”

Mr. Weisz: And I continue:

“Q. We will leave the answer, but I will lay a little more foundation so we have the record straight.

Is it your duty, Dr. Cox, to advise the test manager with regard to blast effect?

A. Insofar as I am able.

Q. And in so doing, what do you actually advise him—what the blast pressures are and the effect of the blast pressures at various points?

A. Since the test director is a scientist, I generally advise him the magnitude of the blast pressures.

(Deposition of Dr. Everett Cox.)

Q. In what units or terms?

A. In the terms of the meteorologist in that we measure pressures in units called the bar; the bar is one atmosphere, and a milli-bar is $1/1000$ [267] of an atmosphere, so I generally express the pressure in terms of so many milli-bars.

Q. Is it within the province of your duties to determine how many milli-bars or bars will produce deleterious effects on structures such as plate glass windows?

A. This has been incidental to my duties. Where I have had measuring equipment nearby to structures that have obtained damage, I have, of course, noted what the pressure levels were, and what the evident damage was.

Q. And has it been your experience that the plate glass windows which you have mentioned will be damaged at a pressure which is less, measured in the terms of milli-bars, than other types of construction parts?

A. That is simply my belief. I have not visited sites of all the claims.

Q. You have visited a number, have you?

A. I have visited the site of the Sears and Roebuck Store, and other places where plate glass windows have been damaged.

Q. Have you visited places where other types of structures have been damaged?

A. Not off the test site. [268]

Q. And on the proving ground have you had the

(Deposition of Dr. Everett Cox.)

opportunity to observe the effect of various pressures on structures? A. I have.

Q. And on the basis of that experience, have you found that glass, in particular plate glass, will be damaged at a lower pressure, measured in millibars, than other types of structures?

A. I don't recall any plate glass windows in the structures I have looked at other than structures in Las Vegas. I don't recall any plate glass windows at the test site.

Q. Have you had the opportunity to observe that at a certain pressure a plate glass window will be damaged, whereas other structures, structural members, will not be?

A. No. I have seen the windows in several of the stores in Las Vegas when they have been damaged. I have not visited residences of other claimants on those same dates.

Q. In your opinion, based upon your knowledge of physics and your knowledge of blast effects, is a plate glass window a more easily damaged structural piece than other types of structural pieces?

A. From its construction, I would [269] certainly gather that that is the case.

Q. Why is that, Dr. Cox?

A. Plate glass windows — show windows — are strong against forces from the outside of the store. They are very, very weak from forces on the inside of the store. A very thin phosphorous bronze strip holds these windows in place from the outside; and since these sound waves contain both compressions

(Deposition of Dr. Everett Cox.)

and rarefactions, they appear to suck the windows out with a very low pressure.

Q. None of the windows that you have seen have been pushed inward, then?

A. None of these large plate glass windows.

Q. And it has come to your attention, then, that plate glass windows are damaged through these low pressures, whereas there has been nothing brought to your attention where other damage has been concerned by that type of pressure?"

Mr. Brett: The deposition contains a correction, striking the word "concerned" and having it read "caused by that type of pressure."

"A. That is right.

Q. Can you tell us, then, at what pressure these plate glass windows will be damaged?

A. Yes, from measurements made here in Las Vegas [270] on a date when damage was done to store windows, the peak overpressure was 1.5 millibars; that is equivalent to essentially three pounds per square foot.

Q. Now, Las Vegas is at approximately what distance from the site?

A. Approximately seventy-five miles. Damage didn't occur, however, as a result of one of these low level inversions; it was a low level signal, but it was a focusing case rather than a straight decay of pressure with distance."

Mr. Brett: Just a moment, Mr. Weisz.

I move at this time, if your Honor please, to strike the statement, beginning with the words

(Deposition of Dr. Everett Cox.)

“Damage didn’t occur,” as not responsive to the question.

The Court: It may go out.

Mr. Weisz (Reading):

“Q. In other words, do I understand from that, that aside from the usual refraction we have mentioned previously, whereby the waves are bent and bounce up and down, that there can occur a focusing of these waves in one spot?

A. That’s it; it’s also illustrated in this same article.

Q. So we can have it before us, can you [271] tells us where in the article?

A. Figure 4 in the article shows two clear-cut examples of such type focusing.

Q. Then this 1.5 millibar reading, peak reading, I think you called it, was produced by a focusing of the blasts’ sound waves onto one area, which presumably was Las Vegas?

A. On that particular date, as I recall, the blast struck one-third of the distance to Las Vegas, and then struck again at two-thirds, and then struck Las Vegas; in other words, there was a focus one-third of the distance, then another focus at two-thirds of the distance, and the third time it struck here. There may have been only two bounces on that date, I do not recall exactly.

Q. Now, with regard to the low level refraction pattern, including a focus phenomenon which might occur, presumably, can you tell us what the maximum reading or pressure would be at a distance of

(Deposition of Dr. Everett Cox.)

a hundred fifty miles away from the test site?"

Mr. Brett: I stated an objection:

"By Mr. Brett: I object to that on the ground that there has been no foundation laid; the question is incompetent and ambiguous. It does not state whether you are assuming the weather conditions remain [272] the same, what the nature of the weather conditions are; the nature of the terrain. I object to it."

Mr. Weisz (Reading):

"I'll withdraw the question.

Q. Dr. Cox, from your knowledge as a physicist, and as a person working in the field, and working with the nuclear detonations that have taken place, can you tell us what a maximum would be from any particular detonation at a distance of, let's say, a hundred fifty miles from a low level refraction?

A. No. From the weather data taken at the time of the shot, and we do release a weather balloon as soon as possible after the shot is fired, from that weather data I can compute what the pressures probably were, and in view of my past experience and verifications, I will say that it will be very close.

Q. With regard to the fall series, the winter series of 1951, can you do that?

A. From the weather data and the classified information yields of the weapon, I can compute it.

Q. Have you done so? This is on the low level refraction.

A. I have done so for certain directions. I have

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not done so for all directions from the test [273] site.

Q. Would it vary with directions?

A. It does vary with direction, since this graph of velocity versus altitudes depends on wind as well as temperature.

Q. Have you graphed it for a northerly direction? A. I have not.

Q. Have you for an easterly or westerly direction?

A. For the southeast; primarily, because of the lineup of Las Vegas, Henderson and Boulder City.

Q. Can you tell whether or not, under the weather conditions prevailing during that period, whether the pressures will be greater to the north and southeast?"

Mr. Brett: I am sorry, but it appears very clear that there are corrections, your Honor, here that are not on Mr. Weisz' copy, which was the only thing I examined, so if the court will permit me I will read the question as it has been corrected by the witness.

The Court: Very well.

Mr. Brett (Reading):

"Q. Can you tell whether or not, under the weather conditions prevailing during that [274] period, the pressures will be greater to the north than to the southeast?

A. I can tell by recomputation of the data; but the probability is very small because of the prevailing westerly winds."

(Deposition of Dr. Everett Cox.)

Mr. Brett: I move to strike the last part of the statement as not responsive to the question.

Mr. Weisz: This is based upon the doctor's knowledge and it explains his answer.

Mr. Brett: Well, I direct it to the court's attention. Pardon me.

The Court: All right. Go ahead.

Mr. Brett: Pardon me. Just immediately prior to that, the doctor said clearly that he has only made a record of the computations to the south-east, but that he did not do so to the north and the other directions. Then the question is, "Can you tell whether or not, under the weather conditions prevailing during that period, the pressures will be greater to the north than to the southeast?"

Now, he says he can tell by recomputation of the data. He does not state that he has made a recomputation, and I think his voluntary statement about probability is not responsive to the question.

The Court: Denied.

Mr. Weisz (Reading): [275]

"Q. In other words, pressures would be less to the north than to the southeast?

A. Most probably; that is, the low level signals.

Q. Then can you tell us what the blast pressures at a point a hundred fifty miles from the test site would have been at a maximum during this period? That would be the shots of October 22, 28, and 30th, and November 5, 1951.

A. Well, here I have to go into a new lecture in science. At about eighty miles to a hundred fifty

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miles, a new type of sound wave comes down. It is not a sound that is held in the low levels of the atmosphere, that is, the lower six or eight miles. It is part of the energy which escapes from the low levels and reaches a layer called the ozonosphere, located twenty to thirty-five miles above the earth. Now, that layer is nearly the same temperature as the ground, so far as we can learn from rocket measurements and this very acoustical phenomenon we're talking about; and since it has a temperature so near that of the earth, if the temperature happens to be a little warmer, sound comes down at these greater distances; if it's a little colder, the sound doesn't come down. If the wind up there is blowing a little bit to the east, [276] the sound will come to the east and not to the west; and if it's blowing a little to the west and not to the east, then the sound comes down to the west. These we refer to as ozonosphere signals.

Q. Dr. Cox, can you effectively rule out your low level refraction at a distance of a hundred fifty miles?

A. We can for any given direction; and considering the sizes of the nuclear devices that are tested here in general, the low level signal pressures beyond a hundred miles have been very trivial, too trivial to cause any damage.

Q. Can we state that from the fall series of 1951, that a low level refraction could not cause damage at a distance of a hundred fifty miles in any direction?"

(Deposition of Dr. Everett Cox.)

Mr. Brett: At that point I made another objection:

“I don’t believe, as yet, there’s a foundation laid. He said he hasn’t made the checks and tests, and so forth, except for a southeasterly direction.”

Mr. Weisz: I didn’t hear the word “objection.”

Mr. Brett: I think that the whole statement that he made there earlier might be properly described in the language of the late President Roosevelt, who is said to have used it one time, that it was quite “iffy.” I realize the man is an expert [277] and a very devout scientist but, even so, it doesn’t seem to me that he should be permitted to draw a very explicit conclusion of that kind, with the foundation that has been shown.

The Court: Do you make a motion to strike the testimony?

Mr. Brett: I am making objection to the question which he has not yet answered, but he does answer it.

The Court: The objection is overruled.

Mr. Brett: You asked another question in connection with it, Mr. Weisz.

Mr. Weisz: No. That was an answer to your objection. I said, “This is based upon the theory of physics.”

Then he answered.

Mr. Brett: I will show the court the text. Here is the question and the objection (indicating on transcript to the court). It seems to me that Mr. Weisz is adding a question in there.

(Deposition of Dr. Everett Cox.)

The Court: Well, what is your objection now?

Mr. Brett: There is no objection except it seems to me that there is another question being added and then an answer.

The Court: No. As I read that, is a discussion between you and Mr. Weisz.

Mr. Weisz: As I recollect it, your Honor, that was the purpose of the interjection.

Mr. Brett: All right. I will read it, then, in that manner. [278]

“This is based upon the theory of physics.”

And this is the doctor’s answer:

“I have not checked it for the northerly direction. The possibility of it being there is very, very tiny.”

Mr. Brett: Now, I move to strike that upon the ground that that is a conclusion of the witness for which there is no foundation.

The Court: The objection is overruled.

Mr. Weisz (Reading):

“Q. You stated, did you not, Dr. Cox, that the northerly direction would have lower blast pressures than the southeast at this particular period, which is the fall of 1951?

“A. Even more generally than that, since we are in a band of prevailing westerlies; the pressure levels east from the site (east, southeast, and northeast) are essentially always larger than those toward the west, southwest and northwest. In other words, essentially from southeast to northeast is the area where we are more likely to concentrate blast because of prevailing westerly winds.

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“Q. Then, can we state that a hundred fifty miles to the southeast the pressures caused by the low level refractions would be too minor to [279] cause damage during the fall of 1951?

A. Not categorically. Because of the focusing situations which have existed in this direction on occasion, I would have to have a particular distance and a particular set of weather data to say for sure that they were not. In other words, when we have a focus, we have a repetition of the focus; the pressure is less on each successive strike by the square of the number of the bounces; on the second bounce the pressure levels are reduced to one-fourth what they were on the first; on the third the pressures are reduced to a ninth.

Q. In terms of your experience and your knowledge, can you state in terms of probabilities what the chances would be of having a significant blast pressure from low level refraction at a distance a hundred fifty miles to the north during the fall series of 1951?”

Mr. Brett: I again renew the objection. I understand the court's ruling will be consistent?

The Court: The objection is overruled.

Mr. Weisz (Reading):

“A. From the experience we have had with all of the shots, the probability is vanishingly small.

Q. Now, Dr. Cox, you have previously mentioned that [280] your problem at that distance generally is from a higher level refraction?

A. Correct.

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Q. That was in what area of the atmosphere?

A. The ozonosphere.

Q. Now, can you tell us what procedures you go through prior to a detonation in order to enable you to predict what the ozonosphere refraction might be?

A. Yes. As you appreciate, we cannot obtain weather data from the band twenty miles to thirty-five miles above the earth. The weather ballons do not go that high, so we are not able to compute mathematically from weather data what would happen as a result of the weather twenty to thirty-five miles above the earth. Starting in August of 1951, we set off at the test site a large number of high explosive shots, in general about one ton of explosive, and we placed instruments at several locations within this relatively wide band from perhaps seventy-five miles minimum to a hundred fifty miles maximum. We measured the pressures that were refracted down to earth from the ozonosphere whenever we fired one of these shots. Then the test series was all ready to begin, we arranged to fire one of these same high explosive shots [281] one hour before each nuclear detonation. We compared the pressure we measured on that date with the statistics we had previously obtained to see whether the pressures were uncommonly low or uncommonly high or middle. And then from scaling laws by which we attempt to predict big stuff from measured small stuff, we would predict for these

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outlying stations what the pressure levels would be from the nuclear shots.

Q. During the periods of experimentation in August of 1951 and during the series of tests that took place in October, November and December of that year, how many such measuring stations did you have?

A. We had all the measurement equipment that was available in the United States at that time. There were eight in number.

Q. And what is this instrument?

A. It is called a microbarograph.

Q. You say that there were eight, and these were the only eight in the United States?

A. So far as we were able to learn.

Q. And these belonged to the Commission?

A. No. These belonged to the Naval Electronics Laboratory at San Diego.

Q. And you borrowed them for the [282] purpose?

A. We borrowed them for that purpose.

Q. Let me understand the procedure that is followed here. You set off a high explosive detonation, one ton, I think you said?

A. Essentially one ton, yes.

Q. And you have the microbarograph somewhere between seventy-five and a hundred fifty miles away?

A. We had some of them in those locations. We were also interested in verifying my low level calculations, so we had quite a number of the eight

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instruments located inside of the seventy-five mile circle.

Q. And then you got the readings from your high explosive shots at these various distances from the place where you detonated the high explosive. Then, as I understand it, you scaled up to determine what pressure might be expected at those various points from a much higher yield from a nuclear detonation? A. That's right.

Q. Have you had the opportunity to verify your scaling? This scaling is a mathematical computation, I presume? A. Right.

Q. Have you verified that scaling computation by [283] the results of the nuclear detonations?

A. We have verified it on many occasions, although at the time of the particular test series we weren't always able to verify. The instrument must be very sensitive in order to get a decent reading from the one-ton shots, and it still must be relatively insensitive to always get the highest reading that comes in from the nuclear shots. These particular instruments didn't have as wide a range as we would have liked. They were quite sufficiently sensitive but weren't sufficiently insensitive to fulfill our requirements.

Q. In other words, your instrument was sensitive enough to give you readings for high explosives, but had too narrow a band, and you couldn't take the higher pressures when the nuclear detonation was set off?

A. It sometimes went off scale. Part of that was due to the narrow band of the instrument, and then

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part of it was due to our inexperience with setting the instrument.

Q. Have you used better instruments thereafter?

A. We have.

Q. And they have verified the scaling formula that [284] you used?

A. To within perhaps twenty-five to fifty per cent error.

Q. You are still using the same scaling formula today that you did in 1951? A. Yes.

Q. Now, you said you set off the high explosive shots one hour prior to the nuclear shot?

A. This was not always absolutely true. Sometimes it was as late as minus one-half hour and sometimes it was as early as minus one and a half hours.

Q. Can you tell us why that particular time period is selected?

A. We need to assume that the weather remains constant between the time of the high explosive shot and the nuclear detonation, so we want the time as short as possible. On the other hand, it does take sound a significant time to reach a hundred thirty-five or a hundred forty miles, and after the sound reaches there and records on the instrument, then the man must telephone or radio back into our station and tell us what reading he obtained; so we can't have it too close in time. If we want to issue any protective notices to the populace that they will experience fairly high pressures, we need time to issue that [285] notice; so we can't have the time

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either too long or too short. One hour seemed reasonable.

Q. When you advise the populace that they are going to experience fairly high pressures, in what terms is that put, do you know?

A. I inform the Director of Test Information and I don't know what form he uses for his announcements.

Q. Now, referring to the high explosive shots that you set off, before the detonations on October 22, 28, and 30th and November 5th of 1951, can you tell us what readings you had at a distance away from the site? Do you have a record of the readings?

A. Yes. And my most comparable distance on that particular series was the station at St. George.

Q. St. George, Utah?

A. Which was essentially a hundred thirty-five miles distant.

Q. And St. George was in which direction?

A. St. George is almost directly east, I believe. It's a trifle north of east.

Q. And do I take it that what you said before holds true, that the probability, due to the direction of the winds, is such that the pressures to the east will be greater than those to the north? [286]

A. Now we're talking of winds up in the region twenty to thirty-five miles above the earth.

Q. That's right.

A. And there is very, very little scientific information on those winds; there's little reason to

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assume that they would not be in the easterly or westerly direction, and we know that they change with seasons, but there is very, very little scientific evidence concerning winds at those altitudes; apparently the winds at those altitudes are blowing more often from west to east in winter and from east to west in summer, but this series was in the fall——

“(By Mr. Brett): Let the record show the doctor throws up his hands.

Q. Then, Dr. Cox, based upon what information is available, is it your opinion that the pressures to the north will at least be, or are likely to be, the same as those to the east?”

Mr. Brett: I then stated an objection:

“I will have to object to that; you’re simply calling for a guess, there’s no basis laid——”

Mr. Weisz: By myself:

“Since it happens to be the best guess in the country, from one of the six men in the country or [287] the world who can give it, I don’t know how we can get it any better.”

Mr. Brett: I will state now, your Honor, assuming that Mr. Weisz’ statement is correct, which appears to be correct from the record, I still don’t believe that that lays a foundation so that the witness should be permitted to guess.

The Court: The objection will be sustained. He himself states it is just a guess.

Mr. Weisz: Oh, yes. The only reason I went forward with the questioning was that, granted that

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it is but a guess, it is the only thing one can have, if you want to go into the area at all.

The Court: I know, but you can't prove a fact by guessing, even though there might not be evidence available. If there isn't evidence available, it can't be proved by guessing, as a substitute for evidence.

Mr. Weisz (Reading):

“Q. Now, can you tell us what the readings were in St. George? Is that where you had the station? A. Right.

Q. For October 22, October 28, October 30th and November 5th, 1951?

A. The values that I have here”—

Mr. Brett: And then there is an inked parenthesis— [288] “(as I said, our instruments were limited in upper range)—the readings I have here are what I would have computed them to be, based upon my preliminary shot.

Q. You don't have the readings on the preliminary shots?

A. I have the readings on the preliminary shots scaled up to what it would be on the nuclear shot.

Q. Based upon that scaling formula, could you tell us what the pressures were that you predicted on those four days at St. George?

A. 0.2 millibars on October 22nd, .03 on October 28th; 0.2 on October 30th, and 0.35 on 5 November. I have them also for Boulder City.

Q. What is the distance of Boulder City?

A. Boulder City is essentially a hundred miles.

(Deposition of Dr. Everett Cox.)

Q. Could you give us the readings for Boulder City on those dates?

A. October 22, 0.02; on October 28th, 0.45; on October 30th, 0.2; and November 5th, 0.09.

Q. These are the pressures scaled up to those that you were predicting for the nuclear detonations that were to take place those days? [289]

A. Right.

Q. And they took into account the yield, the energy to be released by that nuclear detonation?

A. They took into account the energy to be released insofar as the Los Alamos scientists were able to predict what the yield would be.

Q. Do you know whether the predicted yield was borne out in the series during the fall of 1951?

A. None of the actual yields were significantly different—none of the yields were more than ten per cent larger than predicted.

Q. And a difference between prediction and yield of ten per cent, being ten per cent greater yield, what would the effect be when scaled?

A. Three per cent.

Q. The ten per cent would come down to three per cent difference in the millibar readings?

A. Correct.

Q. Doctor Cox, you stated that a 1.5 millibar pressure damaged the windows in Las Vegas at one time, did you not?

A. Right.

Q. That was a peak pressure, was it?

A. That's right.

(Deposition of Dr. Everett Cox.)

Q. Have you recorded lower pressures in Las Vegas [290] at which point the windows were not affected? A. Many times.

Q. Can you tell us at what point the windows will be affected; is it 1.5 or much less, or where would it be?

A. We have recorded one millibar peak pressure here in Las Vegas without damage.

Q. Then somewhere between one and one and a half millibars will produce damage on plate glass windows, that is true, is it not?"

Mr. Brett: Here is an objection which I made, which I will not make, so you can omit that. I will read the answer:

"A. I can't imagine it would take anything different to break windows here than anywhere else. When we put one and a half millibars here, not every plate glass window in town goes. I suppose we take out the weak ones. It is not possible to say that one and a half millibars breaks all windows; neither could I say you could not break an improperly installed window with one millibar, although we didn't.

Q. Now, I believe previously you gave the effect of a 1.5 millibar in pounds per square foot. What was that? A. Three.

Q. Three pounds per square foot? [291]

A. 3.2, I guess it is.

Q. Now, the effect of this reading, millibar reading, is a change in atmosphere, is it not, a change in atmospheric pressure? A. That's right.

(Deposition of Dr. Everett Cox.)

Q. And can you tell us how a change in atmospheric pressure causes damage?

A. On the plate glass windows, this pressure of three pounds per square foot pushing in on the windows seems to do no damage whatsoever; the windows are well reinforced on the inside of the stores to hold the windows against window shoppers and wind. But the negative phase or rarefaction or suction phase which follows a 1.5 millibar compression is essentially 1.5 millibars of suction, and these plate glass windows are not fixed to withstand three pounds per square foot pushing from inside the store, so the plate glass window comes out.

Q. Now, all structures are subjected to atmospheric pressure. We're under atmospheric pressure now, are we not? A. Absolutely.

Q. Does that pressure change during the day?

A. Right.

Q. Is the change greater during any short [292] period as a rule?

A. Well, during a matter of several hours, yes, but not comparable with the one or two seconds variations, except as we have gusts of wind.

Q. Will gusts of wind produce an atmospheric pressure change? What sort of gust of wind, what speed would produce an effect like that of 1.5 millibar change?

A. The Handbook of Engineering Fundamentals——

Q. You are referring to a text book?

A. Yes, Eshbach, 'Handbook of Engineering

(Deposition of Dr. Everett Cox.)

Fundamentals,' says that 3.1 pounds per square foot is equivalent to a thirty-five-mile-per-hour wind speed. In other words, an automobile driving thirty-five miles per hour has on the windshield one and one-half millibars excess pressure.

Q. As compared with the surrounding atmosphere? A. That's right.

Q. And at a 1.5-millibar reading, that is the effect that we have? It would be the same as the effect on the windshield of a car driving thirty-five miles per hour? A. Right.

Q. You stated with regard to the plate glass that the store was closed and therefore there [293] was a suction, did I understand you correctly?

A. Suction on the outside, or the windows blew out. As we reduced the pressure on the outside by one and a half millibars, there was a differential pressure across the window with three pounds per square foot more pressure on the inside than on the outside of the window, so the window was pushed out of the store.

Q. Does not the atmospheric pressure equalize itself on both sides of the window?

A. If the store is opened enough. If it had its doors and windows open it could equalize rapidly enough; but we shoot these things sometimes early in the morning, and, in the case of the particular picture you have there of the Sears Store, the doors were closed, the windows were closed, so the store couldn't breathe.

Q. Just to clarify that, the witness is referring

(Deposition of Dr. Everett Cox.)

to a picture heretofore shown him by plaintiff's counsel, 'Assuring Public Safety in Continental Weapons Tests,' page 90."

Mr. Weisz: That has been received in evidence, and it contains a picture of a store in Las Vegas which this occurred to.

Mr. Brett: That is stated in the next part. [294]

Mr. Weisz: Oh, I am sorry.

Continuing with the deposition:

"Then the change in pressures, at least of this type, the 1.5 millibar type, will not cause damage where pressure can be equalized, where a building has this breathing space you mentioned?

A. We have recorded higher pressures on the outside of buildings, and have done no damage where the building has been opened.

Q. So the net effect then, with the Las Vegas windows, was a thirty-five-mile-an-hour wind blowing from the inside? A. Right.

Q. Now, with a pressure of 0.35 millibars, could you translate that to pounds per square inch and/or into wind effect?

A. 0.35 would be twelve miles per hour wind effect. Wait a minute, now. You're reading millibars and I'm reading pounds per square foot. (Doctor computes) 0.35, that's .75 pounds per square foot, and a .75 pound per square foot is about eighteen miles per hour."

Mr. Weisz: At this point I stated there was nothing further, and after recess we continued with cross-examination by Mr. Brett: [295]

(Deposition of Dr. Everett Cox.)

“Cross-Examination

By Mr. Brett:

Q. Now, as I understand it, Dr. Cox, your duties in connection with these nuclear detonations at the Nevada Proving Grounds have been the endeavor, to the best of your ability, from your training and from such information as had theretofore been collected and reduced either to reports, or Government records, or private records, or texts, as to what results had occurred in connection with other operations in which force had been produced by explosive means, and by using weather data and other tests such as balloons, which were allowed to escape up into the air as far as they would go, to endeavor to predict with such accuracy as you could, the probable density of the force that would follow this nuclear detonation, and the area within which that force would operate, is that correct?

A. Correct.”

Mr. Weisz: I interjected at that point:

“Just one second; I just want to clear up the word ‘density.’ You probably mean magnitude—if that is the meaning you have in mind.

“The Witness: Density of force. I don’t know quite what it means.”

Mr. Brett: And I said, “I was referring to the force.” [296]

Mr. Weisz: And I stated, “We all understand, and I will stipulate that density means magnitude.”

Mr. Brett: I might say parenthetically, I looked

(Deposition of Dr. Everett Cox.)

it up in Webster's big dictionary, and it refers to it as "density of force." It probably doesn't make any difference. At any rate, we meant the effect of force.

"Q. I know nothing at all about nuclear weapons, and it's been a long time since I studied physics, but reduced to some form of simplicity, with the nuclear detonation or explosion of dynamite, or some greater force, or in between dynamite and a nuclear detonation, you are starting a physical force that tends at first to go away from the point of explosion and tries to escape, is that right?

A. The energy is moving outward.

Q. And as you stated, the original impetus would be in a spherical form. In other words, it starts from a central point and goes in all directions? A. Yes.

Q. One form of change of that direction would be that if it strikes some counter-force that would tend to deflect it from the point where it strikes something"——

Mr. Brett: ——"is that right?"

And the answer is, "Yes." [297]

Mr. Weisz: Oh, I thought it was a misprint. I guess I didn't read that question correctly.

Mr. Brett: You did not complete the question, Mr. Weisz. Do you want to read it again?

Mr. Weisz (Reading):

"Q. One form of change of that direction would be that if it strikes some counter-force that would tend to deflect it from the point where it strikes

(Deposition of Dr. Everett Cox.)

something, is that right? A. Yes.

Q. Then, another element that would, or could affect an explosive force caused by a detonation, either dynamite or TNT or a nuclear force, would be certain factors of the elements; by that I mean, that if you had the same explosion, that is, as far as the amount of force that was originally produced, and you had a relatively static atmospheric condition, no wind blowing, no moisture, and then had identically the same thing but a stiff wind blowing in a particular direction, or with precipitation of moisture, there would be a variance?

A. Moisture causes absolutely trivial differences; wind and temperature are the two elements that do make a difference.

Q. Although you had your first immediate [298] experience in predicting what would occur in connection with these detonations, and insofar as the Nevada Proving Grounds are concerned, during the series of October and November, 1951, the Government had conducted previous tests and they had accumulated, and there were made available to you some of the results of that test, is not that true?

A. There had been one series here in Nevada in the spring of that year, January and February, and I had available what data there was. No measurements of pressures off the proving ground were made, so I had no recent basis for my experiments. I had actually gone in 1946 to a series of explosions at Arco, Idaho, where the Navy had set off half-million pound charges of TNT; then I had gone to

(Deposition of Dr. Everett Cox.)

Helgoland in Germany to work on an explosion there when the British set off some five thousand tons; the British blew up Helgoland Islands. There were measurements made on those two sets. No measurements were made outside of the proving grounds during the January and February series.

Q. Enough had occurred, however, that it was rather well known that weather conditions would directly affect the results both at the immediate surroundings of the test and also some distance from the test; isn't that true? [299]

A. The effects are more pronounced at close distance than they are at some distance from the test.

Q. And is it not also true that, as stated in the published report of the Atomic Energy Commission, entitled *Assuring Public Safety in Continental Weapons Tests*, the accuracy in forecasting the direction and velocity of the wind is particularly difficult at the ground surface in a mountain-surrounded valley such as the Nevada Proving Ground?

A. I think the particular difficulty arises from the lack of statistical information in that the weather service has run there but a very short period during each of these test series; we have no continuing weather station there, so that the forecasters they have are not trained in what we call climatology. They are not familiar with the particular variances of the wind that occur in that particular area.

Q. Did you not also learn, as reported on page 97 of that report, that in the area where these tests

(Deposition of Dr. Everett Cox.)

were made, the winds might circle the compass in a very few minutes?

A. No. Not in a very few minutes unless we have a—shall we call it an absolute calm [300] breeze, where the gauge is not indicating more than one mile per hour and the air flows a little bit from here to there. I mean, it is not what one would regard as wind at all.”

The Court: We will take a five-minute recess.

(Recess.)

Mr. Brett (Reading):

“Q. Well, then where it states in the report that accuracy in forecasting the direction and velocity of the wind is particularly difficult in the mountain-surrounded valley where the detonations occur, since the winds may circle the compass in a few minutes, you don’t agree?

A. Neither can I completely disagree. These are called drainage winds; the winds’ magnitude may be two miles per hour as the air mass comes drifting down from a hill—these are winds of no consequence; these are drainage winds. In an absolute calm it is difficult to forecast which way the gauge will point.

Q. Did you not find that these conditions which were enumerated directly affect any pressures—at some distance from the proving ground? Would precipitation?

A. Blast effects, no. [301]

Q. Cloud cover?

A. No, not as such.

(Deposition of Dr. Everett Cox.)

Q. Temperature? A. Yes.

Q. Temperature inversions?

A. That's the same as temperature.

Q. And wind directions? A. Yes.

Q. Wind velocities? A. Yes.

Q. Are you familiar with the location of the property that is involved in this particular litigation?

A. Only to the extent that I have been told it is approximately a hundred miles due north, a hundred fifty miles due north.

Q. Do you know where the town of Eureka is?

A. I have seen it on the maps. I've never been there.

Q. This property is about ten miles east and about the same distance south of the town of Eureka. Now, in making your forecast did you have any facility in or near that locality to aid you in forecasting?"

Mr. Weisz: Then there is an interjection by myself, "What particular time are you talking about now?" [302]

"(By Mr. Brett): I'm referring to October and November, 1951.

A. There is a standard weather station in Ely, and I believe there's a standard—no, special weather station put up in Tonopah. I'm not positive. But as far as my instruments for these ozone signals, the nearest I had were St. George and Goldfield.

Q. Well, you know enough about this general

(Deposition of Dr. Everett Cox.)

area to know that the geology in the sense of the nature of the valleys and the nature of the mountains is entirely different in those two areas from that of the location of this property, don't you, Doctor?

A. I would so judge. I mean, the terrain varies very rapidly.

Q. Are you familiar with the fact that St. George is in a wide valley?

A. I have been in St. George; but our predictions in St. George, based on our minus-one-hour shot, show that the terrain, to the best of our knowledge, makes insignificant difference."

Mr. Brett: Now, I move to strike the last part of that, as not responsive to my question.

The Court: It may go out.

Are you sure you have that right? Does that read right?

That doesn't make any difference. It may go out. [303]

Mr. Weisz: I take it that the entire answer is going out, your Honor, as not responsive.

"Q. Doctor, if you were to assume, as a fact, that there was no earthquake, or earth disturbance, I'm talking about surface here, and there was heard this, I think it's a sonic reflection, and observed this tremendous force of wind, as a tremendous velocity of force, I'll put it that way, against these buildings, that was to shake them, and that occurred at the time when the reports disclosed that one of these nuclear detonations had been made, can you

(Deposition of Dr. Everett Cox.)

think of any reason for that indication of exceptional and unusual force upon these buildings other than the nuclear detonation?

A. No. My only query there—from talking with people in such a place as St. George after they, too, have observed these tremendous forces and so forth—I find completely utterly fantastically different stories; and that is the reason why a scientist relies upon measuring equipment rather than visual and audible and imaginative measurements.

Q. From the tests has it been disclosed that there is a very considerable vagary of the effect of [304] these nuclear detonations in this, that in one direction the force will apparently spend itself maybe in a distance of five or ten miles and in another direction leapfrog and spend itself in eighty or more miles? A. Yes.

Q. And with all of the equipment that you have had to date, both physical and material equipment, and technological information, such as you have been able to accumulate, even you, as one of the principal experts in this field, could not prognosticate before a nuclear detonation in what direction it would spend itself in ten miles and in what direction it would leapfrog, could you?

A. I differ. I could do a very fine job with respect to the low level signals for which I get weather data; on the high level ozonosphere signals, I can only guess until the time I make my minus-one-hour shot. I can guess from statistics, from the tests we have made.

(Deposition of Dr. Everett Cox.)

Q. And you have found that the results force-wise and distance-wise have varied materially from time to time?

A. As the winds have varied materially from time to time. [305]

Q. Is it not true that as recently as 1953, the effects of one of your nuclear detonations produced noticeable and distinct sound effects at Cedar City in Utah, some hundred seventy-five miles from the proving grounds? A. Correct.

Q. Isn't it a fact, Doctor, that so far as you know, at least, the very intent and purpose of these tests, including the ones made in October and November, 1951, was to gain further information and to find out how far the effect of these detonations could be traced and to what extent, if any, the force that would result from them would cause damage?

A. In a sense, yes. The Military, who would be users of atomic weapons, if required, are very much interested in what they refer to as militarily significant effects—what types of pressures are required to really wreck buildings. They are not at all interested in trivial pressures such as those that would crack plaster or suck out windows.

Q. What they are trying to find out is, by using varying degrees of nuclear force under various conditions, what results would be produced, is that not true?

A. Various conditions—hardly; if by that [306] you mean whether a bomb is burst a hundred feet

(Deposition of Dr. Everett Cox.)

off the ground, or two thousand feet off the ground, then they are interested;”—

Mr. Brett: And I note, your Honor, that apparently the reporter has emphasized the word “are”; at least it is underlined in the text.

—“but as far as varied conditions—they are also interested in what happens over different types of terrain within the test site; these measurements of which you are speaking are made within a matter of four miles at the most, from the point of detonation.

Q. But they are also taking information to the extent that they can get it to beyond four miles, aren't they?

A. The test organization is, in helping me improve my prediction system, yes.

Q. Now, was there discretion vested in you insofar as your activities are concerned to this extent, that if you found that some isolated farm or ranch setup or some community setup might possibly be affected, that you could change the type and character of the detonation so as to avoid it?

A. My function is Adviser to the Test Manager or Test Director; and when I either compute that pressures would be high”— [307]

Mr. Brett: I will have to go back. I see there is an insert at that point.

“A. My function is Adviser to the Test Manager or Test Director; and when I either compute from the forecast that pressures would be high, or we measure them as high on our advance TNT shot,

(Deposition of Dr. Everett Cox.)

I advise the Test Manager, and then it is his decision as to whether we go ahead and shoot, or whether we postpone. We can't change weather condition; we can't change the conditions of the test, except by delay.

Q. As far as you are concerned, you personally had no discretion; you made reports and they are used one way or the other?

A. I make reports—if I say the pressures will be such and such a size, he usually inquires whether that will or will not be damaging.

Q. I have a note in my notes in connection with your prediction of weather forecasts, something in reference to inhabited localities. Will you tell me what you said with regard to that?

A. Yes, sir. In August and through the test series of 1951 there were eight of these micro-barographs available in the country. I borrowed all eight, and I needed to use discretion in placing [308] the eight instruments to the best of my ability to give maximum protection to the greatest number of people. I was not able, with the eight instruments, to place an instrument at every farm house, ranch, that might be within the zone of receiving these pressures. I had to decide where I would place them to get the maximum protection for the maximum number of people.

Q. Then in connection to your reference to inhabited localities, you weren't referring to isolated ranches or farm houses but to a community of a number of people?

A. Right.

(Deposition of Dr. Everett Cox.)

Q. I believe you said also that of those eight instruments, a substantial portion were within the proving ground itself?

A. No, none were in that area; the nearest was at Indian Springs, which is on the edge of the proving ground;"——

Mr. Brett: Your Honor, may I step down to the board? I want to point these out, because one of the things I will later want to bring to your Honor's attention is that there was no one of these micro-barographs that was placed to the north, northeast, or northwest, even in near line to this property. [309]

"A. No, none were in that area; the nearest was at Indian Springs, which is on the edge of the proving ground;"——

I believe I have a map here.

Indian Springs, your Honor, as will be disclosed by Plaintiff's Exhibit No. 1, is on the south boundary of the proving ground, immediately adjacent to it, and just north and west of Las Vegas.

——"one instrument was there at Indian Springs; one at Beatty;"——

Beatty, as indicated on Plaintiff's Exhibit No. 1, is to the west of Indian Springs and slightly north, right near the California border. In fact, it is right at the California border.

——"one at Goldfield;"——

Goldfield, as shown on Plaintiff's Exhibit No. 1, is north and west of Beatty, about on a line with

(Deposition of Dr. Everett Cox.)

Tonopah, Nevada, and not far from the California line.

——“one in Las Vegas;”——

I think the court can take judicial notice of that, and I won't mention where Las Vegas is.

——“one in Henderson; one in Boulder City”——

all of which are close together in the Las Vegas area, as shown by Plaintiff's Exhibit No. 1.

——“one in Caliente”—— [310]

which is east and north of Las Vegas and just east-erly of the proving ground.

——“and one in St. George”——

which is north and east of Las Vegas, just east of the proving ground, but over in Utah.

“In each instance they were in communities.

Q. Now, if I have understood your direct examination correctly, approximately an hour, sometimes varying, as you stated, so it would only be half an hour and sometimes an hour, sometimes an hour and a half, but usually an hour before the detonation of the nuclear detonation, you would, in effect, conduct a pilot experiment with much lesser force?

A. Much.

Q. In other words, when you stated that you would conduct it with one ton—was it one ton?

A. Yes.

Q. That would be very substantially different than the force you were going to use in the test, wouldn't it?

A. Than the energy that is going to be released.

(Deposition of Dr. Everett Cox.)

Q. Now, you did find, not only from your own personal experiences but from your studies of the experiences of others, which were made available to you, that there were times when there could be very considerable changes in the weather conditions in that [311] hour's period, is that not correct?

A. A rather substantial change, yes. It is not constant; there were days when we observed very little change, and there are days when we have observed maximum change, which is rather substantial."

Mr. Weisz: At this point, your Honor, Mr. Brett asked the court reporter to find a question that he had marked by the reporter, and the reporter read that question as follows:

"And a difference between prediction and yield of ten per cent, being ten per cent greater yield, what would the effect be when scaled?"

Mr. Brett: That was one of Mr. Weisz' questions on direct examination which the reporter read.

Mr. Weisz: That is right. If the court will recall, I had asked the witness concerning the accuracy of scaling out in the estimated yield. He had stated that the predictions of the laboratory were within ten per cent of being correct as to yield from the devices during that period, and then I asked him what would be the effect of the scaling when the ten per cent came to three per cent.

Now, Mr. Brett asks:

"Now, tell me what you mean. What was the ten per cent you were referring to?"

(Deposition of Dr. Everett Cox.)

A. The ten per cent referred to there dealt with the accuracy of the Los Alamos prediction, in [312] advance of the experiment; the difference between their prediction of what the yield would be and the actual yield as measured at the time of the shot.

Q. By yield, are you referring to the amount of energy?

A. The amount of energy released.

Q. Is energy the same as force?

A. No, energy and force are not the same. Those are both scientific terms with very precise definitions.

Q. Then, in other words, when you were referring to yield in answer to Mr. Weisz' question, you were not referring to the amount of force that would be met by any object that came in the path of this energy that was released from the nuclear explosion?

A. The two are very closely related. We ordinarily express the yield of a weapon or device in terms of the equivalent number of tons or thousands of tons of TNT. When we speak of a nominal atomic bomb, we refer to an explosion that has the equivalence of twenty thousand tons of TNT, and that is the yield; the energy released by the nuclear device is the same as the energy that would be released by twenty thousand tons of TNT. [313]

Q. Now, then, as I understand it, when you answered Mr. Weisz' question that the notary marked, you were applying your experience by obtaining and reducing to measurement of the energy yield

(Deposition of Dr. Everett Cox.)

that had actually been developed after a nuclear detonation as compared with that which you had prophesied would be developed was within a ratio of some ten per cent?

A. The actual yield never exceeded the predicted yield by ten per cent.

Q. What did you mean when you said when scaled that would be reduced to three per cent?

A. I shoot my one-ton charge. I make measurements. Then, having been told what the energy release of the nuclear device will be, within ten per cent accuracy, the way it affects my scaling up of the data is only by three per cent, since the scaling factor I use is related to the ratio of the cube roots of the energies released. If the predicted nuclear yield is accurate to within ten per cent, then my predicted pressures, based on weather remaining constant, would be accurate within three per cent.

Q. Now, you used the term 'focus' as part of your direct testimony and you also illustrated it, or referred to illustrations of it, I believe, in this memorandum, that has been marked Exhibit B for [314] identification. Am I correct in interpreting and understanding your testimony that what had occurred was this: after the force of energy had left the starting point, it would come down to some point, and then start again and come down to another point? Is that what you meant by focusing?

A. The focus is the original concentration, and then repeated concentration. In other words, the

(Deposition of Dr. Everett Cox.)

lines that would contain the energy open up with altitude and then close in as they return to the ground, so that instead of finding a decrease of energy with distance, we find a decrease in the air and an increase on striking the ground.

Q. This energy is affected, I suppose, like other forces, by gravity, isn't that true?

A. Not in the slightest.

Q. How does it happen to come down?

A. It is bent down by the winds and the temperature which can be greater at altitudes than on the ground. So the top part of the sound travels faster than the bottom. Therefore it bends over and comes down in a bunch.

Q. In other words, if there is no adverse weather condition, they just continue on in a straight line until they dissipate? [315]

A. That's right.

Q. How are you able to tell where one of these focuses would end and another begin?

A. By mathematical computation from the weather data and known laws of physics, as far as the behavior of sound propagation is concerned.

Q. You don't have to have any station, then, on the ground or at some other place in order to re-establish the point at which the first focus ended and the next focus began?

A. I can compute this from the weather data, but it is very nice to confirm it with instruments. Complexity and size of these instruments nearly prohibits the moving of them, so before the test series begins I have to locate my stations. The

(Deposition of Dr. Everett Cox.)

weather puts these focal points where it desires; if a focus hits my station I have data; if it doesn't, I have no data.

Q. Is it true, Doctor, that the experiments which were conducted between October 22, 1951, and November 5, 1951, consisted in part of detonating weapons containing fissionable and radioactive material with the intent of creating and causing blast waves or air shock waves, which would reach into and bounce or rebound from atmospheric air [316] elevations which surround the earth, and which are defined as the troposphere, an air mass layer within the area from the earth's surface to an elevation of six miles; the ozonosphere, an air mass layer between twenty-five and forty miles above the earth's surface, and the ionosphere, an air mass layer fifty or more miles above the earth?

A. My answer to that would be no; that was not at all the purpose of any of these tests. When an explosion is conducted, blast waves are going to leave and go where the weather takes them, so in no sense could that statement be regarded as the purpose of the test.

Q. What is the intent and purpose, then, of the experiment?

A. The intent and purpose of the experiments conducted at the Nevada test site are improvements of fission weapons.

Q. Well, let's take it in parts. Wasn't the intent and purpose of the——"

Mr. Weisz: At that point I interjected to say:

(Deposition of Dr. Everett Cox.)

“We have got Dr. Graves, who occupies a higher position with the Commission. I’m not going to object, but I actually think he can answer your question——” [317]

This is still by Mr. Brett:

“I would like to ask the question.

Is it or is it not true that the experiments were conducted with the intent and purpose of creating and causing blast waves and air shock waves?”

Mr. Weisz: By myself:

“I will object to that question.”

I withdraw the objection.

“A. No explosion can be conducted without creating an air shock wave.

Q. In other words, that was the purpose, to create whatever would occur in the way of a blast wave and air shock waves?”

Mr. Weisz: By myself:

“I’m going to object as completely argumentative and as merely going over ground that has been previously covered.”

I would like to press that objection, your Honor.

The Court: Objection sustained. It has been asked and answered. He just got through answering that question.

Mr. Brett: Well, it is true, but I had him elaborate on the answer. It is cross-examination. I don’t say he was evasive, but I would certainly say that he was engaged in a lot of tautology. In other words, he was saying, “Yes, [318] we do the thing for a certain purpose, but we do not do it for the

(Deposition of Dr. Everett Cox.)

purpose of shock wave, but you can't do it without the shock wave." I think it is proper cross-examination, but your Honor has ruled.

The Court: Of course, it is argumentative. A simple way to say it is, if a man is going to take a shot at a deer, "Do you shoot to make a noise?" Well, you have to shoot to make a noise. It does happen to make a noise after he shoots, but that isn't the purpose of his making the shot.

Mr. Brett: Well, that is true, your Honor, and of course I am not bound by this Government testimony introduced before the court. We have an article published by the Atomic Energy Commission, which would be carefully considered, and he makes the direct statement that the primary and efficient thing with which they are concerned is the sound wave and effect.

Mr. Weisz: If counsel feels so strong about it, I will withdraw the objection. The answer may be informative.

The Court: Sustained. It is argumentative.

"Q. Isn't it a fact, doctor, that the principal element of these nuclear detonations is the shock wave?

A. There are several elements of interest to the Military, as far as weaponry is concerned, and the blast wave is certainly one of those phenomena.

"Q. You haven't answered. Isn't it the principal element of the test?

"A. Not if you want to set fire to something. If you want to start a fire to something, then the

(Deposition of Dr. Everett Cox.)

thermal radiation would be the principal in that case.

Q. Is it or is it not true that the times these experiments were conducted at the Nevada Proving Grounds between October 22nd and November 5th, 1951, that you and the others who were conducting the experiments knew that the shock waves which could be created from those detonations were capable of erraticable and uncontrollable destruction and property damage?

A. Nearby the test—nearby the site of the explosion, yes.

Q. Is it not true that you knew at that time that it was capable of such destruction for a distance of several hundred miles?

A. No. In fact, previous experience had indicated quite the contrary. Damage had been done in Las Vegas during the previous test series, and that is a distance of about seventy-five miles, which is not one or two hundred miles.

Q. Is it or is it not true that the experiments conducted [320] during the October and November, 1951, series at the Nevada Proving Grounds were made, in part, with the intention and for the purpose of determining how far and to what extent and in what manner damage and destruction would be caused from the forces which were released thereby?"

Mr. Weisz: At that time, I objected "as asked and answered on several occasions."

Mr. Brett: I think in that instance the objection

(Deposition of Dr. Everett Cox.)

is good and although there is an answer, I do not ask that the question stand.

Mr. Weisz:

“Q. Was there any effort made in your conducting of the tests to limit or control the distance within which such damage might occur?

A. Certainly. The particular experiments that are conducted at the test site are very much limited by the Los Alamos laboratory, and as such it very much limits the distance and degree of damage that could be done.

Q. Wasn't the only limit imposed in that manner the amount of nuclear energy that you would release?

A. That was not the only one. That is, of course, very important, but the damage done to locations off the test site is dependent on weather [321] conditions, so we make about every effort possible to know in advance of the tests what the weather conditions are so that we do limit the off-site damage by selecting the firing time.

Q. Are you stating, Doctor, that it is your knowledge that it was intended in those tests that there be no effect beyond the distance of a certain number of miles?

A. It is desired that there be no damage beyond a certain number of miles, and we do take very elaborate precautionary measures to see to it that no real significant damage is done outside of the test site.

Q. Are those measures of a classified nature?

(Deposition of Dr. Everett Cox.)

A. No.

Q. What are they?

A. They largely deal with the weather data. We obtain the weather data from these balloon soundings and attempt to calculate from that information and from my advance shot where damage might occur and how serious the damage might be.

“By Mr. Brett: That’s all.”

Mr. Weisz: And then Redirect, by myself:

Redirect Examination

“Q. Dr. Cox, during the shots of October 22, 28, 30th and November 5, 1951, can you tell us whether [322] the weather forecasts were reasonably accurate?

A. We obtain a group of forecasts. We do not operate on one forecast only; we have probably four or five weather forecasts as the shot time approaches; each successive forecast is better than the one before, so that the one on which we do fire the shot is the last forecast and, therefore, certainly reasonably accurate.

Q. By reasonably accurate, what do you mean? I asked you the question; now I ask you to explain the answer. What is ‘reasonably accurate’?

A. A forecast consists of thirty or forty pieces of data: the wind speed, the wind direction, and temperature at essentially every one, two, and five thousand foot elevation from ground to 50,000 feet; it is not uncommon at all for the forecaster to miss his forecast by perhaps ten miles per hour in speed

(Deposition of Dr. Everett Cox.)

or fifteen degrees in direction at any one of several elevations. As the zero hour approaches, he is using more up-to-date information from balloons just released, so that his forecasts get better still. A miss of only ten miles an hour or fifteen degrees is still considered very good."

Mr. Weisz: At which time both counsel stated that they had nothing further. [323]

At this juncture, your Honor, I would like to offer for identification, as we did with the previous depositions, the depositions of Dr. Graves, General Fields and Dr. Cox, for identification only, as Defendant's Exhibits A, B and C, in that order. Dr. Graves' deposition would be Exhibit A, General Fields' deposition would be Exhibit B and Dr. Cox's Exhibit C, for identification only.

Mr. Brett: What will those be, for my notes? What are they designated?

The Clerk: Graves, A; Fields, B; Cox, C.

The Court: They will be marked and I assume that the same stipulation is made that you had in the case of the other ones, that although they are not in evidence and only marked for identification, the court may refer to them in lieu of the record.

Mr. Brett: That is so stipulated. That is the purpose of it, your Honor.

Mr. Weisz: Yes.

In addition to that, your Honor, I would like to offer in evidence——

Mr. Brett: The chart in the back of the Cox

deposition, is that what you want? I mean that abstract?

Mr. Weisz: No. I think as an exhibit for identification that would be sufficient on those, but with regard to General Fields' deposition I would like to offer as a composite [324] the exhibits attached to that, being marked on the deposition as W-1, W-2, W-3, W-4, W-6, W-7, W-8, W-9 and W-10, as Defendant's Exhibit D.

Mr. Brett: No objection.

The Court: Very well. They will be received as one exhibit.

(Said documents, so offered and received in evidence were marked as Defendant's Exhibit D.)

Mr. Weisz: They are actually concerned with one course, your Honor, and therefore I offered them as one exhibit.

The last item for the defense is the deposition of Mr. Elmo C. Bruner.

DEPOSITION OF ELMO C. BRUNER

"Direct Examination"

By myself:

"Q. Would you state your name, please?

A. Elmo C. Bruner.

Q. And your address, Mr. Bruner?

A. My business address is 903 North Fifth Street, Las Vegas, Nevada.

Q. And what is your business, Mr. Bruner?

A. Architect.

(Deposition of Elmo C. Bruner.)

Q. Could you give us a brief resume of your educational background, please?

A. I graduated from Oklahoma A & M in May, 1931, Bachelor of Science and Architecture, and again in [325] July, 1931, Bachelor of Architecture; the difference is the Bachelor of Science degree is an engineering degree; the architecture is advanced architectural design, and Oklahoma A & M is an accredited college, recognized by Associate Collegiate Schools of Architecture.

Q. Are you licensed as an architect in this State, the State of Nevada?

A. Yes, the States of Nevada and Arizona.

Q. And have you been engaged in architecture since 1931, sir?

A. Yes, and building, yes, sir.

Q. What is the number of your license in the State of Nevada? A. 9.

Q. And in Arizona?

A. I believe it's 1357; then I have a Nevada Engineer's license.

Q. And the number of that, please?

A. 504.

Q. How long have you been practicing in Nevada? A. Since April, 1947?

Q. In architecture and construction?

A. That's right.

Q. Now, Mr. Bruner, did you visit the Bartholomae [326] Ranch or the Fish Creek Ranch near Eureka at any time, sir? A. Yes, sir.

Q. Do you recall approximately when that was?

(Deposition of Elmo C. Bruner.)

A. It was in 1952, in the spring of the year; I don't remember just when, either April or May; I could look in my notes; I don't know the day we were actually there——

“(By Mr. Brett): I have a note of April 23rd.”

Mr. Brett: 23rd.

Mr. Weisz: Yes.

Mr. Brett: Yes.

“The Witness: I believe it was; I can tell you for sure; it was the day we had the test up here, I think, called Operation Bigshot; we went to that site—to the test, and then went on to Eureka the same day and spent the night in Eureka and went on to Fish Creek Ranch the next day.

“Q. Can you tell us what you examined at that Bartholomae Ranch?

A. We went through all the buildings, as I recall; there were four in particular in which the owners were perturbed about breaks in the plaster.

Q. Did you examine the breaks in the plaster in those buildings? [327]

A. Yes, sir.

Q. Can you tell us what type buildings they were?

A. In my report, if I recall, I made a note that the buildings were well built; better built than the average farm building. They're frame buildings, rigid asbestos shingles on the outside with plaster board, 16 x 48 inch panels on the studs on the inside over which there is a plaster coat that appears to be hard wall plaster; I don't believe it's fibered. It's applied in the usual manner, from $\frac{3}{8}$ to a

(Deposition of Elmo C. Bruner.)

half inch thick, the final coat being an integral color in the plaster; that's basically what they are.

Q. This is for all four of the buildings?

A. Yes.

Q. Can you tell us what the common names of these buildings are, is there any way of distinguishing them?

A. There was the ranch foreman's house; the bunkhouse; Mr. Bartholomae's home, when he was there, and the other one—I could look back in my notes.

Q. Would that be the mess hall?

A. Probably, yes, it would be; we were in the mess hall.

Q. Did you see cracks in these buildings in the plaster? [328]

A. Yes, sir.

Q. Can you describe to us the cracks to any extent?

A. Yes, they are typical average plaster cracks; the bulk of them appeared along lines of regular construction; by that I mean they appeared on the studs, on the fire block and in the regular panel; as a general rule along the line of the rock lath itself, on the 16 x 48 inch panels, the breaks usually occurred along either the 16 inch line of the plaster board or the 48 inch. In other words, we could count the spacing of the studs between breaks in the plaster; the cracks usually weren't wide.

Q. Mr. Bruner, were the cracks jagged and at irregular angles?

(Deposition of Elmo C. Bruner.)

A. Usually they were straight lines; there were very little random breaks, there were a few.

Q. Were they right-angle cracks?

A. They would go on the studs where the button board or rock lath—those were right-angle breaks but there were a few cracks that would go diagonally along the wall; there was some evidence of that and hard experience to us indicates that that occurs only when there is a poor mix of plaster or a poor adhesion to the rock lath. [329]

Q. The rock lath that you mentioned, what is that?

A. It's plaster board papered on both sides. Sometimes there are perforation holes in them, sometimes there isn't. That's of no particular consequence to me. However, there is a controversy as to the structural values of these holes. The plaster board people say you get a mechanical key where the plaster pushes through the holes and goes over behind the plaster board, it holds on. But the other people, in turn, say no, it's better to depend on the adhesion of the plaster to the paper because if you break the vacuum the plaster will break. Now, there are two types of paper; the plaster board is supposed to be placed with the right side out at all times because the plaster will not adhere to one side of the rock lath. It's put on in the interest of economy; the adhesion paper costs more than the slick paper—if the mechanic inadvertently puts the slick side out there will be no adhesion to the plaster at that point. Now, one more thing, while we're on

(Deposition of Elmo C. Bruner.)

the plaster board. When a mechanic installs this plaster board, there are no measurements taken whatever; they apply it to the studs. If it fits"——

Mr. Brett: At that point I move to strike that as a [330] conclusion of the witness, for which no foundation had been laid. I make the same motion.

The Court: Read that again.

Mr. Brett: He added:

"Now, one more thing, while we're on the plaster board. When a mechanic installs this plaster board, there are no measurements taken whatever; they apply it to the studs. If it fits"——

The Court: Read the question.

Mr. Weisz:

"Q. The rock lath that you mentioned, what is that?"

The Court: Now, read the answer.

Mr. Brett:

"Now, one more thing"——

The Court: Is that where the answer starts?

Mr. Brett: No.

The Court: I am trying to find out if the answer is responsive to the question.

Mr. Brett: Well, it isn't, and that part of it is a conclusion of the witness. First, there is no foundation, but I also move to strike on the ground it is not responsive.

The Court: Well, it will go out on that ground; it is not responsive.

Mr. Brett:

"A. What I'm speaking of is, this as a [331]

(Deposition of Elmo C. Bruner.)

practical matter of the man applying the rock lath to the studs. He nails it on and he uses a hand axe—if the studs facing is equal and he had no joints to cut, it is applied in an orderly manner; but at the corner of the walls where the studs spacing is not equal and where he has to lap his joints, he cuts the lath by sight without taking any measurements and that's well established in the trades. Sometimes there's an eighth and sometimes a half-inch joint.

Q. Is this the usual and common practice in the State of Nevada? A. Very common."

Mr. Brett: At that time I moved to strike the entire answer beginning with what he detailed as having been done, on the ground that it is a conclusion and upon the further ground that there had been no foundation laid to show he has any knowledge whatsoever as to what was done in this case. And I will add to it, that that answer is not responsive to the previous question.

The Court: Is it your contention that this witness was not qualified as an expert? Is that correct?

Mr. Brett: No, no. I don't make that contention, but I do make the contention that he cannot testify under that qualification as to what was specifically done, as far as this property was concerned. However, by the time we got to this [332] deposition we were quite tired that day and I think I could say, your Honor, that since that answer was a continuation of his answer to the other question, which was, "The rock lath that you mentioned, what is that," it should be eliminated as not responsive.

(Deposition of Elmo C. Bruner.)

The Court: Well, the objection is overruled.

Mr. Weisz:

“Q. In your examination of the building, Mr. Bruner, did you see, either from the cracks or otherwise, evidence which, on the basis of your experience, gave you to understand that the rock lath had been applied in that manner?

A. Not to affirm or deny it; I did climb up in the attic but I didn't see the bottom of the ceiling joints where the lath was improperly applied or whether it was a half or an eighth joint; I didn't see it.”

Mr. Brett: On the basis of that answer, I renew my objection and restate it on the basis heretofore stated. I am not objecting to his statement as to what the practice in Nevada was. I am objecting to his statement in effect as to what was done on this property.

The Court: Well, he has testified that he did not see that.

Mr. Brett: That is right. [333]

The Court: Let me see the deposition. I think you are getting tired this morning, too.

Mr. Brett: That may be.

The Court: I have difficulty following you.

Mr. Brett: It begins over on another page, but I thought you wanted the beginning of the page.

The Court: Where is the portion that you are objecting to?

Mr. Brett: I will find it, your Honor. Well, to

(Deposition of Elmo C. Bruner.)

save time, your Honor, I will withdraw the objection, I think; when he says he can neither affirm or deny it, I will let it stand.

The Court: We will recess until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day, Thursday, May 12, 1955.) [334]

Thursday, May 12, 1955—2:00 P.M.

Mr. Weisz: If we may continue, your Honor, at the top of page 8:

(Whereupon, counsel for the parties continued the reading of the deposition of Elmo C. Bruner, as follows, to wit.)

Mr. Weisz:

“Q. Now, are you familiar with this type of construction and its wearability in the State of Nevada? How well it stands up?

A. Oh, yes, we consider most of those have an average service life of about thirty years; that type of building.

Q. Is this a common type of construction in this State?

A. Very common. I personally participated in the erection of about two thousand such buildings since I've been in Las Vegas.

Q. Are the general climatic conditions in Las Vegas comparable to those near Fish Creek Ranch?

A. It gets a little colder up there.

(Deposition of Elmo C. Bruner.)

Q. Does it also get warmer up there?

A. No. It gets hotter up here; the temperature range is about the same.

Q. Now, Mr. Bruner, in your experience [335] with this type of building, this is our frame construction, rock lath and then plaster put on over the rock lath, are cracks apt to appear in the plaster during the passage of time? A. Yes.

Q. Is that due to the manner in which the plaster is applied or what would it be due to?

A. There are several contributing factors and the experience has been borne out in Nevada and other states all the way from Minneapolis and St. Paul through the entire midwest, I found very little difference; first, to me, the biggest single factor is the frame of the building itself; by that I mean we start with the foundation, we bolt down a wood plate on the top of it. Now, the top of the concrete foundation is never exactly level, it's physically impossible for men to do it; there are three ways to handle this; one is to ignore it; the other is to shim it up with wood shingles or put on a grout of cement and sand to level the plate. In the instant case nothing was done. Now, on the top of that plate we set the floor joists, which are wood; on top of the floor joists we set the partition frames, which consist of a bottom plate, studs and two top plates. In the instant case this latter partition frame is all made [336] of two by fours. Now, if we start back at the top of the foundations again we have"—

Mr. Weisz: Then, by myself:

(Deposition of Elmo C. Bruner.)

“Let the record show that the witness is looking at a typical wall section, which he has prepared, which we will offer as Defendant’s A for identification at this time, in order to save time.”

Mr. Brett: And the drawing, I believe, is annexed.

Mr. Weisz:

“(By Mr. Brett): Do you by any chance have an extra copy of that?”

Then the witness said, “Yes,” and he handed a copy to Mr. Brett. Then, the witness continues:

“We have eight bearing connections, all of which have a possible variation of a minimum of a thirty-second of an inch, and in some cases a quarter of an inch. So it is very apparent that we can get at least a quarter of an inch settlement in the frame of the wall itself. Now, let’s isolate the stud walls to illustrate why we have these problems. A carpenter, even a master, is going to saw—we will say in this case up there, in any of those buildings there will be at least three hundred wall studs, theoretically, they are eight feet long. Now, he has to saw and measure each of those by hand. If [337] he measures and misses his saw cut the width of his saw blade, he’s missed it at least a thirty-second of an inch. Say that happens at the top and bottom, or a total of a sixteenth of an inch on any one stud minimum, and they frequently go as much as a quarter of an inch.

Q. What is the result of that, Mr. Bruner?

A. Settlement.

(Deposition of Elmo C. Bruner.)

Q. Does this settlement take place long after the initial construction?

A. That's right, it takes place continuously and then it will expand in the seasons; as the building gets older it expands even more. There are several factors within the materials themselves that further accelerate or retard and we call those the coefficient of expansion of materials.

Q. Mr. Bruner, by that, do you mean that the materials of which a building are constructed change their size with temperature?

A. That's right.

Q. And will the expansion and—I presume also there is contraction?

A. That's right, it is constant through a twenty-four hour period.

Q. Will the expansion and contraction such [338] as that in an area like Fish Creek Ranch in Nevada, produce, in the normal and usual course, cracks in the plaster? A. Yes.

Q. Will that expansion and contraction produce cracks such as those you observed in the buildings there? A. Yes.

Q. From your observation of the buildings and from your experience, what do you think caused—what, in your opinion, caused the cracks that you saw there?

A. My honest opinion is the biggest single factor is the temperature range and the frame of the building, what I spoke of a moment ago, about the stud lengths.

(Deposition of Elmo C. Bruner.)

Q. Does even a very well-built home of this type of construction develop plaster cracks?

A. They all do it. Even before we finish we have the breaks and five and ten years later we have the breaks, and there is not a building in the town that doesn't have the cracks. Even this building we're in, which doesn't enter into it, but I bet I could find an awful lot of plaster cracks in this building that you can't see.

Q. What we have marked as Defendant's Exhibit A [339] for identification, is this typical of the construction in the Bartholomae Ranch?

A. That's typical.

Q. You could tell that from your observation of the building?

A. Well, we looked under the floor and crawled up in the attic; we could see the thickness of the walls by looking through the doors and the windows and by seeing the breaks in the plaster from which we could measure the spacing of the studs.

Q. One further thing, Mr. Bruner. The plaster that is put on over the button board or rock lath, how is that put on, what is that?

A. The surface coat was nothing more than a color coat, which was purely for decorative effects; it is a very orderly job, well built; underneath it, where we could see through the cracks, there was a hard-walled plaster, which we know in the trade as hard wall plaster, which is a gypsum plaster. Now, I couldn't detect whether or not it is fibered unless I just tore out a section of the wall, which we didn't

(Deposition of Elmo C. Bruner.)

want to do and damage the building. Now, by fibered plaster we mean this: Plaster is inherently a very weak material and they put fiber of hemp, wood or hair in the plaster to hold it together because the [340] wood fibers or the hemp or hair fibers are intermingled in a countless number of different directions and it acts as a reinforcing mesh but I couldn't see any of it in the cracks I observed."

Mr. Weisz: And I said, "Nothing further."

We will continue with the Cross-Examination by Mr. Brett.

Cross-Examination

"Q. Mr. Bruner, you were up there in the spring, you say, of 1952? A. Yes.

Q. And the first time you went up there you went at the request of General Adjustment Bureau?

A. Yes.

Q. Who accompanied you?

A. Mr. Wesley Hall.

Q. He is an adjuster, is he? A. Yes.

Q. Now, who did you meet at the ranch?

A. Well, we met the ranch foreman.

Q. Mr. Seale?

A. I wouldn't know the ranch foreman at the time. We met him and his wife, in fact, we met the whole crew, but I don't remember the names.

Q. Now, at that particular time had you formed some sort of a preliminary conclusion as to what probably [341] had caused these things?

(Deposition of Elmo C. Bruner.)

A. I didn't know what they were or anything about them. I had no idea.

Q. And you also went back on June 30th?

A. Yes, I met Mr. Bartholomae and Mr. Millard.

Q. And you also met a Mr. Norwood, who was the contractor who built the property?"

Mr. Brett: Your Honor, I did so state in my question, but I want to state to the court that I learned afterwards that I was erroneous in that portion of the question in which I interpolated that Mr. Norwood had built these properties. He did not. The answer is:

"I met Mr. Norwood.

"Q. And you met someone from some plaster company?

A. I met a man from the United States Gypsum Company and an attorney for Mr. Bartholomae.

Q. A Mr. Mize? A. I don't know.

Q. You went there to find out, if you could, what the cause was of the damage you saw to the buildings, is that right? A. Yes.

Q. I believe you testified on direct examination that you tore no section out of the buildings to find out anything about their construction? [342]

A. No, I didn't. I didn't want to damage the building.

Q. Mr. Norwood had with him a set of the plans and specifications of these buildings, didn't he?

A. He didn't show them to me.

Q. Didn't you learn at that time from Mr. Bar-

(Deposition of Elmo C. Bruner.)

tholomae that Mr. Norwood was the contractor who had built those buildings?"

Mr. Brett: Again that was a misapprehension on my part. The answer is: "A. I don't recall. He might have made the statement, but I don't recall.

Q. Did you make any inquiry of anyone there as to the age of the buildings? A. Yes, sir.

Q. When did you find they were built?

A. As I recall they told me they were about ten years old.

Q. Ten years old in 1952? A. Yes.

Q. And did you make any inquiry of anyone there as to the type of construction of the walls?

A. I didn't need to. I could see it.

Q. Well, from your examination, as I understand it, you said you were not able to tell whether this plaster was fibered? [343]

A. I couldn't see it through the cracks.

Q. Didn't you state that you couldn't tell whether it was fibered? A. That's right.

Q. And by fibered I think you said if it was, it would have more strength? A. That's right.

Q. By the way, you said there were three types of fiber, wood and hair and what was the third?

A. Hemp.

Q. Did you ask Mr. Norwood or anyone else whether this plaster was fibered?

A. Yes, I asked.

Q. What did they tell you?

A. I asked specifically what kind of plaster is

(Deposition of Elmo C. Bruner.)

this, and he said plaster. Again I asked and he said plaster, and I said, 'Look, there's fifty or sixty different kinds of plaster, what kind is it?' The poor fellow blushed and I said, it is gypsum, hard wall or gauging plaster or cement plaster, and finally I said, 'It's hard wall plaster, isn't it,' and he said, 'Yes,' and that's all the information I could get, but nobody answered specifically if it was fibered plaster or not.

Q. In your answer you have related 'he,' who was he? [344]

A. Mr. Millard.

Q. Did you ask Mr. Norwood?

A. I was not talking directly to Mr. Millard. The question was directed to all three of them, Mr. Millard, Mr. Norwood and the United States Gypsum Company man, but no one answered the question.

Q. Had you ever been to this ranch before your trip in April, 1952?

A. No, sir.

Q. And have you been there since your May trip?

A. No.

Q. Were these cracks that you saw new or old cracks?

A. Both. Some of them were so old that they were obviously repaired when the building was built because they had been racked out and refilled with plaster of the same color.

Q. Where were those?

A. In all the buildings.

Q. It is your testimony, as I understand it, that

(Deposition of Elmo C. Bruner.)

they were old cracks that had been repaired in all the buildings?

A. In all the buildings, yes, sir.

Q. Did you direct anyone's attention to that fact? [345] A. Yes, sir.

Q. Whose attention did you direct to that fact?

A. Mr. Millard, Mr. Norwood, and the United States Gypsum man.

Q. Did you ever meet two Mr. Millards?

A. I met the young one. I never met the old one.

Q. When was this drawing that has been marked 'A' for identification made? A. Yesterday.

Q. This doesn't purport to be a true representation of the buildings out there, but merely—

A. Just merely typical, that's all, that's right.

Q. The construction on those buildings, then, could or could not be the same as this, is that right?

A. That's right.

Q. I believe you referred to the fact that the bearings were hand sawed? A. The studs, yes.

Q. The studs were hand sawed? A. Yes.

Q. Did someone tell you that was true?

A. I don't need to be told.

Q. Could you tell from your examination?

A. Yes.

Q. What means did you have? [346]

A. When I got up into the attic and looked down the line at the plates, they were irregular.

Q. So you drew the conclusion from that, that they were not power sawed?

A. It wouldn't make any difference; there is

(Deposition of Elmo C. Bruner.)

still the human element, you can't saw three hundred pieces of wood the same way.

Q. Then you don't know whether they were hand sawed or power sawed?

A. Some of them had to be hand sawed because they don't put a power saw on the ceiling to saw ceiling joists. As a matter of fact, Mr. Brett, a man sawing a joint by hand is more accurate than a man sawing a joint with a power saw.

Q. You obtained some information regarding the temperatures at Ely? A. Yes, sir.

Q. Did you, in the course of your investigation, learn that as a part of the operation of that ranch, they had a weather station and had a record of temperatures right there? A. No.

Q. You didn't see such an installation right by the buildings you were inspecting?

A. No. [347]

Q. Do you have a record with you of the temperatures you considered at Ely? A. Yes.

Q. Will you produce it?

A. This is a carbon copy of a letter that was directed to me from Wesley Hall, direct to Mr. W. A. Bartholomae, Jr., dated May 6, 1952, wherein Mr. Hall has reproduced my original report to the General Adjustment Bureau.

“(By Mr. Brett): Will you mark that Plaintiff's 1 for identification, please?”

It was so marked.

“The Witness: May I request that I get a copy of this back for my own files?”

(Deposition of Elmo C. Bruner.)

“(By Mr. Brett): All right.

Now, will you examine page 3 of that letter?

A. Yes, sir.

Q. And in that letter on the top of page 3, you have a reference to the Government record of highs—that is extreme high, and extreme low during a particular year at the station which is maintained at Ely, and for the period between 1941 and 1952, is that right? A. Yes.

Q. Actually, 1952 doesn't show any high, does it? [348]

A. No, because it was too early, but it shows a low.

Q. Now, during what period of the year, in your opinion, would the highest differential in temperatures occur? A. Winter.

Q. And what months would you consider winter?

A. Well, of course, the astronomical winter is from December 21st to April 21st.

Q. I am referring to what you refer to, not an astronomical winter.

A. I would say at least the middle of November to the middle of March.

Q. You would say, then, from the 15th of November to the middle of March? A. Yes.

Q. Now, as I understand, you drew the conclusion that the plaster cracks that you saw on your visit to the ranch property in April and May of 1952 were the results of temperature changes?

A. That's right.

Q. And such a result would not be confined to

(Deposition of Elmo C. Bruner.)

one year, it would occur when there were extreme changes in temperature in any year, isn't that right?

A. That's right, it wouldn't make any difference. [349]

“Q. And that would be relatively continuous each year, if you had a wide range of temperature with quick changes, there probably would be some cracking occur, is that right?

A. That's right.

Q. If that conclusion is true, then there should have been evidences of substantial cracking not only in the year 1951 but in any other year in which there was considerable temperature changes, is that right?

A. That's right, which was evidenced by the fact that some of the plaster was cracked and patched before the buildings were finished.

Q. Is it in your knowledge that there have been substantial changes in temperature in that particular area, referring to the area of this ranch, since May of 1952? A. Yes.

Q. And would you not then assume that there would be further cracking?

A. Yes, sir, I would.

Q. Then, if there were no further cracks, at least it would indicate that conclusion might not be correct?

A. That would be a logical conclusion but [350] I would like to examine the buildings because I can show them further cracks.

(Deposition of Elmo C. Bruner.)

Q. I would like to have you examine the buildings, if I could authorize, it, but, of course, I can't.

Now, if you will examine your record of the Ely temperatures, you show probably the highest differential there in the years 1942 and 1943.

A. For that particular year?

Q. No, for any of those years the highest differential——

A. No. The highest is from 1942 and 1943 to 1952. It makes no difference when it takes place, the Good Lord putting the sun above the earth is no respecter of building materials.

Q. In other words, on the theory that you have there, the cracking would most likely occur when there is the highest differential in temperature?

A. That's true, in that the cracking will occur over the years, but it is more apt to occur in a twenty-four hour period of maximum range in temperatures.

Q. Now, you refer to a manner of installing the button lath? A. Yes.

Q. Did you make any inquiry of anyone there as to whether that manner was followed in this particular [351] case? A. No.

Q. Could you tell if from your own inspection?

A. Except in the breaks in the regular pattern of the lath.

Q. You didn't strip any of it? A. No.

Q. You don't know whether they used a regular or irregular pattern, do you?

A. Yes, they used irregular patterns, because I

(Deposition of Elmo C. Bruner.)

could see it; the buildings were well built and very orderly, let's understand that; they are very good; better than the average, in fact, but plaster still breaks.

Q. Now, this communication, marked Exhibit 1, is the report that you made to the General Adjustment Bureau for the Government?

A. Yes, sir.

“(By Mr. Brett): I would like to offer it in evidence as Exhibit 1 in connection with this man's testimony.

Nothing further.”

Mr. Weisz: “Redirect Examination” by myself:

Redirect Examination

“Q. That which we have identified as Defendant's Exhibit A, for identification, from your inspection of the Bartholomae buildings, this is a typical example of [352] the construction used in those buildings, is it not?

A. That's right, it's good construction, and that is typical.”

Mr. Weisz: And by myself: “I will offer that with the deposition.

“Q. You have stated, Mr. Bruner, that cracks will ordinarily and customarily appear in buildings constructed as the Bartholomae buildings were, due to temperature variations, in the course of time?

A. Yes, they will widen in the winter and close up in the summer.”

(Deposition of Elmo C. Bruner.)

Recross-Examination

“By Mr. Brett:

“Q. You know that there have been some cracks in plaster buildings which the Government has paid for as the result of these Atomic Energy Commission's tests, do you not? A. Yes.

“(By Mr. Brett): And I assume that in the course of your experiences, you have examined those buildings? A. No.

“(By Mr. Brett): You haven't examined any on which they have paid for plaster cracks?

“A. I examined one.

“(By Mr. Brett): Did you find any difference in the pattern of the cracks of the plaster in that particular instance than you found up there? [353]

A. None whatever.

Q. In other words, then, from the standpoint of mere visual examination of the construction, without taking out a section and seeing the after-effect, there was no way you could tell by examining the Bartholomae buildings, in which, in your opinion, the cracks were the result of temperature changes, and examining the one building in which there were, you said, cracks which were the result of an Atomic Energy Commission blast, you couldn't tell any difference from a visual—a visual difference from what you could see?

A. I didn't see any in plaster.

Q. What type of building did you see, then?

(Deposition of Elmo C. Bruner.)

A. They paid for some breaks in a masonry wall; that was the only one I ever visited that they paid.

Q. Then you didn't see any of the buildings in which there were plaster cracks and for which they paid?
A. There is one exception.

Q. Just answer one way or the other. Did you or did you not see any buildings in which the plaster was cracked for which the Government paid a claim on the basis that such damage occurred from the Atomic Energy Commission's blasts?"

Mr. Weisz: At this point, I interjected: [354]

"Just one second, Mr. Brett. I am going to object to this entire line of questioning on the basis, among other things, that we are going beyond the knowledge of Mr. Bruner as to whether or not they were paid, and further that it's far beyond the knowledge of Mr. Bruner as to why a claim might have been paid, if he knew it was paid, and, third, on materiality. I'm just bringing that up so if you can frame the question to eliminate the objection, I suggest you do so.

"Q. (By Mr. Brett): Well, I thought he said he knew these facts.

As I understand, you have, from time to time, been employed to examine properties on which claims have been made against the Atomic Energy Commission, is that right?
A. Right.

Q. And those claims, so far as you are informed, were on the basis that the damage had been caused

(Deposition of Elmo C. Bruner.)

as a result of exploding nuclear weapons on the Nevada proving grounds, is that right?

A. Right.

Q. Did you examine any of those properties in which the claim was for plaster cracks?

A. Yes.

Q. Did you examine any on which you had [355] been informed the Government paid the claims?

A. One.

Q. Where was that?

A. Here in Las Vegas.

Q. And that was a case where plaster was cracked? A. Yes.

Q. Was there any difference in the appearance of that crack that was discernible to you and the appearance of the cracking at the Bartholomae ranch?"

Mr. Weisz: Your Honor, I will object to that question on the ground that it is irrelevant and immaterial and does not go to the issues of this case.

The Court: The objection is overruled. You objected to the wrong question.

By Mr. Brett:

"A. No, this—I would like to explain what happened. I didn't authorize the payment; the payment was made a year before I got in the picture. What actually happened, in the first series of tests, the Government authorized the payment on the claim."

The Court: That is not responsive.

Mr. Brett: That is true, but I have to read it.

The Court: Yes.

(Deposition of Elmo C. Bruner.)

Mr. Brett: Because I have said that very thing, your Honor: [356]

“What actually happened, in the first series of tests, the Government authorized the payment on the claim.”

At that time, if the court please, I stopped him. I said, “Just a minute. I will object. He is not answering the question.”

He was explaining his answer. So I move that go out.

The Court: All right. It may go out.

By Mr. Brett:

“A. The following year they filed another claim for damage on the next series of tests and the Government sent me out and I recommended the claim be denied and I made a very close examination of the building. I explained to the man, the claimant, that the break was caused by a strongback. A strongback is a structural member that goes down the center of a ceiling at right angles to the ceiling joist, which was required by the Federal Housing Administration’s architectural department at that time, or at the time that house was built. Experience has dictated that when we put in a strongback in a plaster building, we invariably get a plaster break along the line of the strongback where this break occurred. The Federal Housing Administration recognized the structural weakness and has since absolutely excluded the use of a strongback in buildings insured by the Administration. I explained it to the [357] claimant and he took his

(Deposition of Elmo C. Bruner.)

saw and sawed the strongback out and we haven't heard from him since."

Mr. Brett: I will object to that and move to strike it as not responsive to the question.

The Court: I think you are just barely ahead of Mr. Weisz. I think he was going to——

Mr. Weisz: Mr. Brett had made that objection on the record and I think it was well taken.

Mr. Brett: I made the motion to strike.

The Court: It will be granted. It may go out. Incidentally, the question you have objected to has never been answered.

Mr. Brett: All right, your Honor.

The Court: I don't know why you made the objection. There has never been an answer to the question.

Mr. Brett: That is true, your Honor, he never did answer.

The Court: All right, you may proceed.

Mr. Brett: "Now, Mr. Bruner, I show you one of the Government's reports, *Assuring Public Safety in Continental Weapons Tests*, published in January, 1953. When was this that you say you went out to see a property on which a claim for damages was paid?

"A. The same year I went to Eureka, 1952.

Q. And that was, then, after the tests that [358] were made in October and November, 1951?

"A. That's right.

Q. Now, is this the second time or the first time?

(Deposition of Elmo C. Bruner.)

A. The second time I went out the claim was denied.

Q. In the footnote 4, page 88, of this report, there is a statement here that a total of 294 claims resulted from the second series of October and November, 1951, and it states how many were settled and the amount and it says all resulted from the November blast; then were allowed * * * again for plate glass windows in Las Vegas, the balance being for cracked stucco, plaster and smaller items——

A. That's November, 1951?

Q. Yes; now did you examine and make any report upon any of the properties on which those claims were paid for damages resulting from the blast on November 1, 1951?"

Mr. Weisz: To which I will object, your Honor, that it is irrelevant, it is immaterial, and it is beyond the knowledge of the witness.

Mr. Brett: Well, it so happens he said, "No," so I won't make any contest of the objection.

The Court: Objection sustained. [359]

Mr. Weisz:

"Q. Then you never saw those particular cracks?"

Mr. Weisz: To which I will object.

Mr. Brett: Again he said, "No," and I make no question about it.

The Court: Very well.

Mr. Weisz: That completes the examination.

I would like to offer this as Defendant's Exhibit E for identification, with the same stipulation as

on the other depositions, that the court may use it for convenience in lieu of the record.

The Court: Very well. It will be marked.

(Said deposition transcript of Elmo C. Bruner was marked as Defendant's Exhibit E for identification.)

Mr. Weisz: The United States rests, your Honor.

(Whereupon, the defendant rested its case.)

Mr. Brett: Your Honor, I would like to ask that the clerk be permitted to take that drawing, that is, loosen that drawing so that we can use it on rebuttal, that is in the back of Mr. Bruner's deposition, I believe, marked as an exhibit. It is the last one that is a drawing. I don't know the exhibit number.

I would like to recall, for a brief rebuttal, Mr. Norwood.

The Court: This drawing that you are referring to, is [360] that the drawing that was admitted into evidence?

Mr. Brett: No. It was the drawing that was referred to several times in Mr. Bruner's testimony as being typical. I will find it here in just a minute.

Mr. Weisz: It was part of Mr. Bruner's testimony. It was explanatory of his testimony. I did not offer it in evidence, feeling that it deserves about the same status as his testimony. It is merely illustrative.

The Clerk: Is this the one, Mr. Brett?

Mr. Brett: That is right. What will that be, F?

The Court: That has not been marked yet, is that it?

Mr. Weisz: No, your Honor.

The Court: It will be marked next in order.

(Said drawing was marked as Defendant's Exhibit F for identification.)

Mr. Brett: So we can tie it in, then, may the record show that the document which is now received as Defendant's Exhibit F in evidence is the same document which was referred to in Mr. Bruner's deposition as Defendant's Exhibit A for identification?

The Court: There is no objection to its being received in evidence?

Mr. Weisz: No, your Honor.

The Court: All right. It will be received in evidence.

(Said drawing previously marked Defendant's Exhibit F was received in [361] evidence.)

Mr. Brett: Will you take the stand, Mr. Norwood?

JOHN L. NORWOOD

recalled as a witness herein on behalf of the plaintiff, having been previously duly sworn, testified further as follows, in rebuttal to wit:

Direct Examination

By Mr. Brett:

Q. I am going to show you the drawing, Mr. Norwood, which has just been received as Defend-

(Testimony of John L. Norwood.)

ant's Exhibit F. Will you state to the court whether or not that is in any way typical as an example of the construction of the properties on the Bartholomae Fish Creek Ranch?

A. Well, it is typical in the manner that that is the way a number of materials are put together, it is in the order that they are put together. There is no scale on the drawing or sizes of any material except the studs.

Q. Would that drawing be of any assistance at all in determining the construction of the building?

A. Only in the order in which the materials were put together, yes.

Q. And what things are not in that drawing to make it complete?

A. Well, there is no scale on the drawing, so it doesn't show how far the footings are in the ground or how wide the foundations are or the size of the floor joists. [362]

The only indication as to size is the 2 by 4 fire blocking and the 2 by 4 studs, but there is no indication as to any roof bracing, any insulation, any solid sheeting on the roof, shingles on the roof, any type of finished flooring, or the size of the flooring or the size of the joists, concrete mix, ventilation, windows, anything like that.

Q. Mr. Norwood, is it true that it is physically impossible to lay a foundation so that it is exactly level?

A. No. We try to get all our foundations

(Testimony of John L. Norwood.)

straight. Foundations should always be laid straight and they normally are.

Q. Now, you examined these Bartholomae improvements upon the Fish Creek Ranch?

A. Yes, I did.

Q. Were they level? A. They were.

Q. When I am talking about "they," I mean the foundations. A. Right. They were.

Q. Now, assuming that I can connect up by Mr. Bartholomae's testimony following yours on rebuttal, that when these buildings were constructed there was power available and power equipment was used, would you state whether or not in using power equipment and cutting 300 or more wall studs, there would be a variation in the length of the studs [363] that were cut?

A. There would be no variation, no, if you cut them with power equipment, provided you tried to be accurate.

Q. Based upon your inspection of this property, in the manner in which it was built, what would be your conclusion with reference to the studs in those buildings?

A. Well, it is quite obvious that everything was straight, the foundation was straight, the eaves were straight on the house. That will show up, the crooked wall quicker than anything when you look at the overhang of the house. If the gutters on the house are up and down and the eaves are up and down, normally it is crooked.

Q. Have you had occasion during the years to

(Testimony of John L. Norwood.)

erect buildings in which the dimensions were irregular instead of everything being square?

A. Oh, yes. In remodeling buildings, we run across buildings that are not square and things aren't cut as accurately as they might be.

Q. Now, does such a factor have anything to do with the tensile strength of the building and the question of whether or not it will settle?

A. Not necessarily. In other words, it is like building a box. A house is basically built something like a box. You could build a box out of square and out of plumb and have it just as strong as a box that was not square. As [364] long as everything fits tight, and it is well nailed, as long as the joints fit and are securely fastened, it will be strong.

Q. I believe you testified on your direct, when you were on the stand before, that with reference to these particular properties, at such points at which there were stresses, it was over-built in the sense that they were stronger than the normal?

A. That is right.

Q. You were present on May 30, 1952, when Mr. Millard was there and Mr. Bartholomae and his attorney, Mr. Mize, and Mr. Bruner who has just testified were there?

A. Yes.

Q. Was there any man there who was from the United States Gypsum Company?

A. No, sir.

Q. Did Mr. Bruner at any time direct your attention, during that day, and while he was there, to what he claimed to be old cracks in the buildings?

A. No.

(Testimony of John L. Norwood.)

Q. Did you hear him request information as to the type of plaster that was being used and that had been used? A. Yes.

Q. Will you state to the court whether or not Mr. Millard answered him? [365]

A. Yes, he did.

Mr. Brett: Just answer that yes or no.

A. Yes, he did.

Q. Will you state what was said, in your presence and in Mr. Bruner's presence, and to Mr. Bruner?

A. Well, Mr. Bruner asked Mr. Millard—

Mr. Weisz: If your Honor please, I will object to the question as irrelevant and immaterial. It was asked of this witness on cross-examination, by Mr. Brett, and I did not feel that I could object to it originally, since he was trying apparently to cross-examine the witness, but we are now going into a very material point. I will object on that ground.

The Court: Overruled.

A. Mr. Bruner asked Mr. Millard what kind of plaster was used on the building, and Mr. Millard told him it was gypsum lath with a hard wall plaster and interior stucco finish.

Q. (By Mr. Brett): Now, during the course of that visit and while Mr. Bruner was present, were you in the building when Mr. Bruner made comment in reference to some cracks in one of the buildings? A. Yes, I was.

Mr. Brett: Just answer yes or no.

A. Yes, I was.

(Testimony of John L. Norwood.)

Q. And who were present at the time? [366]

A. Mr. Millard, Mr. Bruner and I went into the Bartholomae cottage first.

Q. And will you state to the court what was said at that time?

Mr. Weisz: Could I have the reporter read the question?

The Court: Yes.

(Record read by the reporter.)

Mr. Weisz: I will object as no foundation laid, your Honor.

The Court: Overruled.

The Witness: Will I answer the question?

Mr. Brett: Yes.

The Witness: I have answered the question.

Mr. Brett: Have you answered it?

A. Yes. Mr. Millard and Mr. Bruner and I went into the Bartholomae cottage. And you want me to state what——

Q. Yes, I have asked for what was said?

A. We walked in, we entered into the living room. The living room is a rectangular room about 13 by 22, I would say, and there was quite a noticeable crack down the center of the ceiling in the living room. And I asked Mr. Bruner what he thought caused that crack and he said, "It is quite obvious the ceiling joists run that long way of the room and there is a ceiling joist right over that crack, and it is cracked right along the ceiling [367] joist."

(Testimony of John L. Norwood.)

And I said, "Well, no. The ceiling joists run the other way; they run the short way of the room, and if you wish, we can get up and I will show you."

And Mr. Bruner turned around and walked out of the building.

Mr. Brett: That is all with this witness.

Cross-Examination

By Mr. Weisz:

Q. Now, as to this document marked Defendant's Exhibit F, would you read the legend on it, please, Mr. Norwood? Does it have a legend?

A. Yes. It says, "Typical Wall Sections, Frame Construction of the Type Used for Bartholomae Corp. at Fish Creek Ranch, Eureka, Nevada."

Q. Now, Mr. Norwood, would you expect on a print of that type to find the sizes of the joists, the flooring, the subflooring, the rafters, the sheathing, the eaves, et cetera? Is that a building plan, sir?

A. This is meaningless without that, yes.

Q. It is meaningless for what purpose, Mr. Norwood?

A. Well, it doesn't show if the foundation is brick or concrete block, or concrete; it doesn't show how the mud sill was bolted to the foundation, whether it is quarter-inch bolts or inch bolts, how long they are; it doesn't show whether the mud sill is redwood or fir, or it doesn't show [368] if the floor joists are 2 by 4's or 2 by 8's or 2 by 12's; it doesn't show whether the footings are down, set into the ground 6 inches or 3 feet. It doesn't show

(Testimony of John L. Norwood.)

if there are any interior footings under the house bearings. It doesn't show any bracing whatsoever in the house, which is one of the most important features of a building. It doesn't show the size of the ceiling joists. If the ceiling joists were very small, the ceiling would sag and crack in fact. He just says, "Ceiling Joists." He doesn't show the rafters. He doesn't show any roof bracing at all.

In other words, this could be drawn without seeing the building, because every house in the United States is built just this way.

Q. That is right, isn't it, every house in the United States is built this way?

A. That is, the foundation, walls and so forth are put together in this way, but it doesn't say here what size they use; in other words, in some places they use 2 by 4's for joists and in some places they use 2 by 8's; and no building department would accept this for a permit. No carpenter could build a house to this and that specific specification.

Q. Thank you, Mr. Norwood. I think that will be all.

Now, you had occasion to inspect the foundations of these buildings that we are concerned with here, did you not? [369] A. Yes, I did.

Q. And did you check them with a level?

A. No. I checked them by sighting. There is no way of putting a level on them, without removing some of the structure.

Q. In other words, you have to use a mere sighting?

(Testimony of John L. Norwood.)

A. There are two ways of checking. You can sight and also, you have a rim joist on all foundations and if the rim joist fits the mud sill, it is straight, and if it does not fit, it is crooked. In this particular case it was straight.

Q. Now, you stated that where studs are cut with power equipment, depending upon the use of the power equipment, that they could come out equal, is that correct? A. Right.

Q. That would depend upon the power equipment, would it not?

A. I would say it would depend upon the operator of the power equipment more than the power equipment.

Q. Well, would all power equipment do that?

A. You could take the finest piece of power equipment that is made and saw something crooked if you tried to.

Q. No, but if you had an insufficient power saw?

A. No. I think as long as the saw ran, you could saw it straight. [370]

Mr. Weisz: Fine. I have no further questions.

Mr. Brett: That is all. Thank you, Mr. Norwood.

Mr. Bartholomae.

The Court: We will take a five-minute recess.

(Recess.)

The Court: You may proceed.

WILLIAM A. BARTHOLOMAE

recalled as a witness herein on behalf of the plaintiff, having been previously duly sworn, testified further, in rebuttal, as follows:

Direct Examination

By Mr. Brett:

Q. Mr. Bartholomae, you have been sworn before.

Did you have power equipment when the improvements were erected at the Bartholomae Fish Creek Ranch? A. Yes, sir.

Q. And power equipment was used throughout in that work?

A. Yes. It was there until the job was finished.

Q. And it was used for cement mixers, and so forth? A. Yes, sir.

Mr. Brett: That is all.

Cross-Examination

By Mr. Weisz:

Q. Mr. Bartholomae, was all of the wood cutting done [371] by power when these buildings were built? A. Not all of it, no, sir.

Mr. Weisz: No further questions.

Mr. Brett: That is all, Mr. Bartholomae.

That is all of the plaintiff's evidence, if the court please.

Mr. Weisz: Both parties rest, your Honor.

The Court: Sir?

Mr. Brett: The plaintiff rests, yes, sir.

Now, your Honor, I wonder if I might ask a per-

sonal favor? I have been faced with the situation all of this week of an injunction hearing, a very important injunction hearing coming up before Judge Praeger on next Wednesday. It is a labor matter. It involves a voluminous set of documents. Your Honor is familiar with those matters. Now, there are a great many affidavits and matters of that kind. I have been working as best I could at night. I have an associate and he started a paternity suit, something I have never been mixed up in, but apparently it is something he has been on during that entire period before some jury in the State Court. Of course, while I have lived with this case and know about it, I think I could make a better presentation and a more satisfactory one if you would permit me to file a memorandum and allow me approximately 15 days. I could make it shorter and more succinct. I started to dictate one, but I find that [372] after the evidence is in there are certain things I wish to point up with reference to the evidence that has been adduced in these depositions. If your Honor will permit it, that is what I would like to do, because I would like to get back to the office and get to work on the other matter. It is very important. It is going to mean that I am going to have to work nights and Sundays to get ready for it.

The Court: All right. Suppose we make it fifteen, fifteen and five.

Mr. Weisz: Your Honor, then, I take it we will not have any refinement of the issues at all?

The Court: What do you mean by no refinement of the issues? You refine the issues in your memorandum of points and authorities.

Mr. Weisz: Yes, your Honor, and I tried to refine them also on a motion to dismiss, but I did want to be sure that all issues are exact and will be covered then.

The Court: That is right.

Mr. Weisz: Thank you, your Honor.

The Court: That is right. I will take it under submission. Fifteen, fifteen and five.

Mr. Brett: Yes, sir. [373]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 4th day of April, 1956.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Endorsed]: Filed May 11, 1956. [374]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 86, inclusive, contain the original:

Complaint;

Answer;

Motion and Notice of Motion for Summary Judgment, Memorandum of Points and Authorities; Proposed Findings of Fact and Conclusions of Law, Proposed Summary Judgment;

Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment with affidavit in support thereof;

Affidavit of Robert W. Millard;

Affidavit of Arthur J. and Chrystal B. Seale;

Order Denying Motion for Summary Judgment;

Plaintiff's Proposed Pre-trial Order;

Amendment to Answer;

Memorandum of Decision;

Findings of Fact and Conclusions of Law; Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Statement of Points on Appeal;

Ex Parte Order Extending Time for Filing

the Record on Appeal and Docketing the Appeal;

Counter-Designation of Contents of Records on Appeal;

which, together with 3 volumes of reporter's transcript of proceedings; and plaintiff's Exhibits 1, 3 to 31, inclusive; 34 to 37, inclusive, and defendant's Exhibits A to F, inclusive (plaintiff's Exhibit D being attached to plaintiff's Exhibit B); all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of appeals for the Ninth Circuit, in the above case.

I further certify that my fee for preparing the foregoing record amounts to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 10th day of May, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15141. United States Court of Appeals for the Ninth Circuit. Bartholomae Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 11, 1956.

Docketed: May 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15141

BARTHOLOMAE CORPORATION, a Corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF RECORD FOR PRINTING
AND STATEMENT OF POINTS

Bartholomae Corporation, a corporation, Appel-
lant, designates for printing the portions of the
record, hereafter following, and adopts as its State-
ment of Points the Statement of Points appearing
in the typewritten transcript of the record.

The portions of the record to be printed are
(page references are to certified transcript of rec-
ord):

1. The Complaint (2).
2. The Answer (6).
3. The Amendment to Answer (57).
4. The Pre-trial Order (53).
5. Findings of Fact and Conclusions of Law
(66), also Memo Decision, 11/2/55.
6. The Judgment (73).
7. The Notice of Appeal (74).
8. Designation of Contents of Record on Ap-
peals (as filed in District Court) (76).
9. Counter Designation of Contents of Record
on Appeal (as filed in District Court) (84).

10. Statement of Points on Appeal (as filed in District Court) (79).

11. Ex parte Order (by District Court) extending time for filing Record on Appeal (82).

12. Reporter's typewritten transcript of the proceedings (3 volumes).

13. Reserving the right to obtain an order upon stipulation or motion, after notice, to delete from the printed record the photographs, maps, and governmental publications hereinafter identified with asterisks and descriptions within parentheses, all of the following exhibits:

Plaintiff and Appellant's exhibits:

1. (Map)*, 5, 6 (photo)*, 7 (photo)*, 8 (photo)*, 9 (photo)*, 10 (photo)*, 11 (photo)*, 12 (photo)*, 13 (photo)*, 14 (photo)*, 15 (photo)*, 16, 17 (photo)*, 18 (photo)*, 19 (photo)*, 20 (photo)*, 21 (photo)*, 22 (photo)*, 23 (photo)*, 24 (photo)*, 25 (photo)*, 26 (photo)*, 27 (photo)*, 28 (photo)*, 29 (photo)*, 30 (map)*, 31 (government publication)*, 34 (government publication)* 35, 36, 37.

Defendant and Appellee's exhibits: D and F.

14. This Designation of the Record for Printing and Statement of Points on Appeal.

MIZE, KROESE, LARSH &
MIZE, and

IRL DAVIS BRETT,

By /s/ IRL DAVIS BRETT,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 8, 1956.

No. 15141

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

101 DAVIS BRETT,
458 South Spring Street,
Los Angeles 13, California,
Attorney for Appellant.

FILED

601 27 1955

RECEIVED BY APPELLANT'S COUNSEL

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No. 15141
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Opinion Below.

The District Court's opinion appears on pages 17-23 of the Transcript of Record (hereafter "R") and is reported in 135 Fed. Supp. 651 *et seq.* The findings and conclusions appear on R. 23-30.

Jurisdiction.

Jurisdiction of the lower court was invoked as to counts one [tort damage-negligence, R. 3-4] and count two [tort damage-*res ipsa loquitur*, R. 4-5] under Title 28, U. S. C., Section 1346(b). It was invoked as to count three [absolute liability for damage caused by non-negligent trespass through explosion, R. 5-6] under Title 28, U. S. C., Section 1346(a) and was invoked as to count four [inverse condemnation-intentional partial tak-

ing through partial damage, R. 6-7] under Title 28, U. S. C., Section 1346(a) and the Fifth Amendment to the Federal Constitution.

The judgment from which this appeal was taken was entered December 22, 1955 [R. 30-31]. Notice of appeal was timely filed February 16, 1956 [R. 31] and jurisdiction of this Court rests upon Title 28, U. S. C., Section 1291. Venue in the lower court was derived through Title 28, Section 1402.

Questions Presented.

1. Did the District Court err in failing to find that appellee was negligent?

2. Did the District Court err in failing to find that the test atomic explosions of October 22 and November 5, 1951, were the proximate cause of the damage to appellant's property?

3. Did the District Court err in failing to apply the doctrine of *res ipsa loquitur*?

4. Did the District Court err in adjudging that appellee was not liable to appellant upon the ground that the acts of appellee's agents were performed in the exercise of discretionary functions, within the exclusionary provisions of Title 28, U. S. C., Section 2680(a)?

5. Did the District Court err in concluding that appellee was not liable to appellant under the theory of absolute liability arising out of appellee's non-negligent trespass, through air shock waves caused by atomic explosions upon, and damage to, appellant's property?

6. Did the District Court err in adjudging that the damaging of appellant's property by appellee was not a taking of an interest in appellant's property for which appellee was liable under the provisions of the Fifth Amendment to the Federal Constitution and of Title 28, U. S. C., Section 1346(a)?

Statutes Involved.

The Fifth Amendment to the Federal Constitution. Title 28, U. S. C., Sections 1346(a), 1346(b), 2672, 2673, 2680(a), and 1402.

Title 42, U. S. C., Sections 1802, 1803(a)(3), 1803(a)(5), 1803(b), 1806(a)(1), 1810(a), 1810(b)(1), 1810(c)(1), 1812(a)(2), 1812(a)(7) and 1817.

Concise Statement of Case.

Appellant, a California corporation brought this action for damages, consisting of multiple cracking of the plastered walls and ceilings of four of the headquarters buildings on a large cattle ranch, owned by appellant. The damage was caused by two severe shakings of said buildings on October 22, 1951, and November 5, 1951, by air shock waves produced by the explosion of atom bombs at a test site in southwestern Nevada, known as Frenchman's Flat by employees of the Atomic Energy Commission, which test operations were exclusively under the control of appellee and almost all details thereof were classified as restricted and top secret to such extent that such details were not even disclosed at the trial.

In the record the explosions of atom bombs are frequently called nuclear detonations and Frenchman's Flat

or the test site is sometimes called the Nevada Proving Grounds.

Appellant's buildings were located about 150 miles northeast of the test site. There was a long valley between the two sites and no high mountains between them. The buildings were exceptionally strong in construction, with full length, deeply imbedded concrete foundations and heavier than average (for that area and type of use) framework. Detailed examination by an experienced building contractor (Norwood) on September 8, 1951, (44 days before the first impact by the shock waves from the atomic explosions) had disclosed that there was no settlement or cracking of the foundations of any of the buildings which were later damaged and that, with the exception of one ceiling crack in the Mess Hall (sometimes called the cook house) which had been repaired at some earlier date, there were no cracks in the walls or ceilings. Witness, Norwood, who testified orally at the trial, made such detailed inspection preliminary to commencing the construction of additional buildings for the ranch headquarters.

His testimony that there were no cracks in the plastered walls or ceilings, except the one in the Mess Hall ceiling *before* October 22, 1951, was corroborated by the deposition testimony of two witnesses who were residing at the headquarters from July 5, 1951 to July 15, 1952 and were physically present in the headquarters area at the times of the shakings (the ranch superintendent, Seale, and his wife).

The ranch headquarters was in a very isolated area—10 miles from a highway, 80 miles from the nearest railroad, not within any regularly travelled air flight line and there had been no earthquakes in the vicinity.

It was stipulated, that it was common knowledge within the area where the ranch headquarters was located that these test atomic bomb explosions were to be made and that they were to occur on October 22, 1951 and November 5, 1951.

The witnesses, Seale, testified (by deposition), without contradiction in the record, that these buildings were violently shaken during each of these explosions. Mr. Seale testified that the October 22nd blast caused a cattle stampede and Mrs. Seale stated that the November 5th shock threw her to the floor and that when she ran out of the office building she saw dust mushrooming up over the mountain to the southwest of the headquarters area.

The District Court made no finding as to the monetary value of the damage, but the undisputed testimony was that it amounted to \$5,000.00 or more.

The Complaint is in four counts:

(1) Damage caused by negligent acts of appellee's agents performed in the course of their employment [R. 3-4].

(2) Damage caused by the inferred negligence of appellee's agents under the doctrine of *res ipsa loquitur* [R. 4-5].

(3) Damages arising out of a trespass upon appellant's property by air shock waves created by the non-negligent explosion of atomic bombs by appellee's agents acting within the scope of their authority—sometimes called absolute liability [R. 5-6].

(4) Damages for a partial taking of appellant's property through the intentional partial destruction thereof, for which an implied contract to pay arose under the Fifth Amendment [R. 6-7].

By answer, appellee denied all of the allegations of the complaint except that the Atomic Energy Commission was an executive agency. It made such denials upon lack of information or belief, except that it denied categorically the amount of appellant's damage [R. 8-10]. By amendment [R. 16] it pleaded the exclusion from consent to be sued in tort contained in Title 28, U. S. C., Section 2680, *as to counts one and two only*.

There was a Pre-trial Order [R. 11-15] in which it was agreed and found (a) that these atomic explosions were performed by appellant under the express mandate of the Congress [R. 12], (b) at or near an isolated, closely guarded and secret site¹ [R. 12]; (c) that these explosions caused air shock waves which could react into and rebound from atmospheric layer elevations which surround the earth [R. 12-13], and (d) that appellee knew on October 22, 1951, through previous experimentation, that these shock waves were capable of extreme,

¹Through inadvertence, which appellant's counsel has just discovered during preparation of this brief, the Pre-trial Order [R. 12], the lower Court's findings [R. 24] and decision [R. 17] all place appellants ranch *northwest* of the testing site and such site *southeast* of appellant's ranch. That the true directions are just the reverse is shown by the uncontradicted record and this Court's judicial notice. Mr. Millard's testimony and his numbers (1), (2) and (3) placed on Exhibit 1 show that the ranch is *northeast* of the test site [R. 45-46 and Ex. 1]. Furthermore paragraph 2 of the Pre-trial Order locates the ranch in Eureka County, Nevada [R. 11] and paragraph 4 of such order locates the test site as 65 miles *northwest* of Las Vegas, Nevada [R. 12] and Mr. Millard locates Ely, Nevada, as being 80 miles easterly of the ranch [R. 116]. This Court judicially knows that Ely and Eureka County, Nevada are located in the extreme *Northeast* portion thereof and that Las Vegas is located in *southwest* Nevada.

erratic and uncontrollable destruction and property damage for which appellee had assumed liability in reports to Congress and for which Congress had appropriated funds for payment [R. 13].

All evidence as to what was done at the testing site, the directions given and discretion reserved in appellee's agents who were conducting the tests were through depositions of the appellee's witnesses, Cox, Fields and Graves. In substance, they testified that all acts were expressly authorized and *directed* and that those engaged in the operation at the test site had no discretion or authority to alter or vary the test explosions, except that they were permitted to make weather tests and direction of impact prognostications for the purpose of deciding whether time delay would better protect life and property *outside* of the test area and, if they so concluded, they could temporarily delay the performance of the test although they could not abandon it or change the constituent elements of the test.

They had full knowledge that they were using extremely high explosives; that a principal purpose was to test and develop them as military weapons in which the production of devastating shock waves was the most important element. They knew that these waves were erratic, almost uncontrollable and were capable of leap-frogging and reaching short and long distances and that they could not be contained within the test site area. They expected them to cause some damage outside of the test area but they did not know where and they hoped

the damage could be kept to a minimum. They expected that appellee would pay for such damage as was caused by the force of the explosions.

The then known and used method for predicting where the air-shock would go and its probable force, was to place instruments called microbarographs in particular directional locations from the test site and then make a pilot test explosion with a one ton explosive [R. 273]. Dr. Cox testified that he could compute very closely the pressure from any particular detonation for a distance up to 150 miles [R. 267-271] and Dr. Graves stated with given wind velocities and directions you could have a *focusing effect* of these shock waves for considerable distances; that such shock waves could be detected at great distances and once you start a shock wave going, it's going to go [R. 197-198].

But Dr. Cox did not place a microbarograph to the *north* of the testing site nor did he graph the conditions to the *north* [R. 266] but he did place such instruments and make such studies to the east, west and south [R. 295-296].

As the trial court states in his opinion [R. 20-21] and as we shall state in our following argument, this, we believe was the *slight* negligence which is all that is required to support a judgment where the defendant is handling dangerous instrumentalities such as firearms or high explosives like atom bombs.

ARGUMENT.

I.

The Trial Court Erred in Failing to Find That Appellee Was Negligent.

The trial court found in part in Finding XV: "Upon the evidence before it, this Court cannot find that any officer or employee was negligent in the performance of his duties relating to atomic experimentation * * *" [R. 29].

This Court must reverse because such finding is clearly erroneous (Rule 52(a), Federal Rules of Civil Procedure).

The uncontradicted evidence was that Dr. Everett Cox was employed as a member of the Test Manager's organization as a specialist in blasts during the October-November series of 1951 [R. 248-249]. Cf. also Finding XI [R. 27]. Appellee's agents were dealing with the greatest explosive power then known—atomic bombs. In a report to Congress prepared and disseminated pursuant to an express mandate of Congress (Title 42, U. S. C., Sec. 1817) which was received in evidence as Exhibit 31, the Atomic Energy Commission (hereinafter called A. E. C.) reported (1) the air shock wave is the most important agent in producing destruction [Ex. 31, p. 85] a nuclear detonation releases tremendous energy, equivalent in a so-called nominal burst to approximately 20,000 tons of T. N. T. [Ex. 31, p. 83], the air shock wave is capable of severe destructive effects [Ex. 31, p. 83]. The Pre-trial Order [R. 13] stated that such waves were capable of extreme, erratic and uncontrollable destruction and property damage. The government report added "because of existing meteorological conditions, such as temperature and wind * * * (such) waves may affect things only

a short distance away in one direction, while affecting others miles away in another direction, or it may leapfrog certain areas and strike more distant ones" [Ex. 31, pp. 85-88; R. 201]. Similar statements appear in the report received in evidence as Exhibit 34 [pp. 10-13]. As Dr. Graves summarized it: "We knew that these shock waves could be detected at great distances; we had no reason to feel that we could confine any of these effects to your fifty miles, and it was clear once you start a shock wave going, its going to go" [R. 198]. He also affirmed that matters quoted from Exhibit 31 were known [R. 201].

It is undisputed, therefore, that appellee, through its agents, acting in the course of their duties, was experimenting with extremely dangerous and powerful firearms and explosives. In such cases "the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a *slight deviation* therefrom will constitute negligence" (emphasis supplied) (*Warner v. Santa Catalina Island Co.*, 44 Cal. 2d 310, 317, 282 P. 2d 12). Such is the law of this circuit: *United States v. White*, 211 F. 2d 79, 87; and of Nevada: *Smith v. Smith-Peterson Co.*, 56 Nev. 79, 90, 92, 45 P. 2d 785, 790.

Negligence, of course, is a comparative term and may be active or passive (19 Cal. Jur., Negligence, par. 4, p. 549). It is to be determined with reference to the situation and knowledge of the parties and to all of the attendant circumstances (*idem*, p. 550; and *Cf. Nicora v. Cervera*, 49 Nev. 261 270, 244 Pac. 897, 900), and, since the duty to exercise care is proportionate to the danger which should be anticipated, liability attaches for a failure to provide against those occurrences which a

reasonably prudent man would anticipate (*idem*, p. 566) and this is true even though the danger arises out of negligence which concurs with an act of God (*Merrill v. L. A. G. & E. Company*, 158 Cal. 499, 504, 111 Pac. 534).²

Such being the law, we now examine the facts:

Dr. Cox and the other employees of appellee who constituted the Test team [R. 27, Finding XI] were dealing with very high explosives [Ex. 31, p. 83] which they knew, from previous conducted experiments, produced shock waves which were capable of extreme, erratic and uncontrollable destruction and property damage [Pre-trial Order, par. 7; R. 13]; they knew that this extreme destructive force could not be confined to the test area [R. 198]; that they would reach into and bounce back from various atmospheric layer elevations which surround the earth [R. 12-13, 200]; that once the waves were released by an explosion they were free from human control [R. 198]; and that they might travel either long or short distances, differing in different directions and that they might leapfrog so as to do both [R. 201].

But they also knew that this erratic conduct of the air shock waves was directly affected by wind velocities and

²We do not cite Nevada law which would normally control (Title 28 U. S. C., Sec. 1346(b) "in accordance with the law of the place where the act or omission occurred") because we have found none which is applicable directly to *explosion and fire-arms* cases. We, therefore resort "to the general doctrines of accepted tort law, whence state judges derive their governing principles in novel cases" (*Britton v. Harrison Construction Co.*, 87 Fed. Supp. 405, 407.) However, *cf. Smith v. Smith-Peterson Co.*, 56 Nev. 79, 90, 92, 45 P. 2d 785, 790: "The degree of care of persons having possession and control of dangerous explosives, such as fire arms or dynamite, is of the highest".

directions [R. 197-198, 257-258] and by temperatures [R. 286, 289; Cf. Ex. 31, p. 86; Ex. 34, pp. 10-13], and although their authority to control or vary the tests was very limited [R. 193-195, 235-236] it was their duty to determine if the existing weather conditions “were, in fact, acceptable” [R. 193-194] they had the means to determine such conditions [R. 197-198, 273-275, 267-271] and the authority to delay the explosions until such conditions existed [R. 201; Ex. 34, p. 13]. They also knew that the effect varied *directionally* [R. 266; Ex. 34, p. 12] yet, although Dr. Cox had the means to test and graph the anticipated blast pressure to the *North* of the testing area (in the direction of appellant’s property) he did not do so [R. 265-266, 295-296; Ex. 1].

Appellant, itself, summarizes what the test Organization (team) and Dr. Cox, particularly, could and should have done, had there been no negligence:

“The Test Organization has a major safety program for anticipating where blast may strike. One item is the firing of high explosive shots prior to the nuclear test, with the blast being recorded on sensitive instruments in communities around the proving ground. If the weather remains constant these provide a good indication of where blast will strike, but if the atmosphere changes only slightly the blast may vary by miles. If strong blast is indicated for any community, the shot may be postponed.” [Ex. 34, pp. 12-13.]

We repeat that the evidence *requires* a finding of negligence by appellee’s employee, Cox, in the performance of his duty and that the trial court’s apparently contrary finding as a part of Finding XV [R. 29] is clearly erroneous and must be reversed.

II.

The Trial Court Erred in Failing to Find That the Test Atomic Explosions of October 22 and November 5, 1951, Were the Proximate Cause of the Damage to Appellant's Property.

The trial court found in part in Finding XV: "upon the evidence before it, this court cannot find * * * that the atomic detonations were the proximate cause of damage to plaintiff's property * * *" [R. 29].

Again, this Court must reverse because such finding is clearly erroneous (Rule 52(a), Fed. Rules of Civil Procedure). The uncontradicted evidence was that before October 22, 1951, there were no cracks in the plastered walls or ceiling of the buildings where the cracks later occurred except the one crack in the mess hall ceiling which had been repaired at an earlier date [R. 56, 60, 66, 68, 130]. There was no rational basis or explanation for the immediate appearance of the cracks instantly following the explosions except as a direct result from the air shock waves caused by such explosions, since the appellant's evidence affirmatively excluded the possibility of their having occurred from (a) settlement of the buildings, (b) earthquake, (c) shaking from trucks on the highway, or (d) the rumble of a railroad train, or (e) air wave shocks from an airline. The evidence was that the buildings were exceptionally strong in their frame work and foundations [R. 127-130]; that there were no settlement cracks in nor changes in elevation of the foundations. In fact, the witness, Norwood testified "they definitely could not have been caused by settlement" [R. 133]. Had there been any cracks they would have been visible when Mr. Norwood inspected the property on September 18, 1951, because, as he testified "plaster repair cracks nor-

mally show, even though they have been painted over or repaired" [R. 135] and Mrs. Seale testified, without contradiction, that the condition of the building just before the first explosion occurred on October 22, 1951, was in the same condition as existed when Mr. Norwood inspected them on September 15, 1951 [R. 68]. There had been no earthquakes in the area during the months of October or November [R. 115-116], the nearest highway was 10 miles from the location of these buildings [R. 46] the nearest railroad was 80 miles away [R. 116] and the buildings were not within any regular air line flight [R. 117].³

Again, the description of what occurred by the witnesses Mr. and Mrs. Seale leaves no basis for any doubt that the only reasonable inference to be drawn is that the buildings were shaken and the plastered walls and ceiling cracked by the impact of the shock waves produced by the atomic explosions: "* * * just as we were about to go into the gate the blast went off, and the cattle whirled and ran to the back of the field to the fence * * * five or six men trying to stop them, but couldn't stop them until they got to the fence" [R. 54]. "I was sorting the ranch laundry and I had just gotten it started and just reached for a pencil off the desk when the shake came * * * it was intense enough it threw me into the laundry * * * at that time I did not know what

³It is interesting to note that Dr. Cox could conceive of no other cause than the shock waves [R. 290-291].

it was. I knew we were going to have the atomic test. I got immediately up and ran out on the porch and looked around * * * and to the southwest could see the dust mushrooming up over the mountain" [R. 65]. We believe that this court take judicial notice of the fact that an earthquake does not produce dust whereas shock waves from an explosion would. The uncontradicted evidence is that immediately following such shakings the plaster cracks appeared for the first time [R. 56, 58, 66, 68]. While Messrs. Millard and Norwood did not see the cracks in the plaster until May 30, 1952 [R. 130] both Mr. Seale [R. 58] and Mrs. Seale [R. 68-69] testified that there was no change in the condition of the cracks between the dates of the explosion and the dates of such inspection, except that the cracks had widened some, and this evidence is uncontradicted in the record. And, of course, it was the cracked condition of the plaster which was the damage to Appellant's property [R. 136]. We, therefore, submit that the evidence points to no other rational conclusion that the air shock waves produced by the atomic explosions were a proximate cause of the resulting damage to Appellant's property and that the trial court's Finding XV as to lack of proximate cause [R. 29] is unsupported by the record and clearly erroneous which requires a reversal of its judgment.⁴

⁴"* * * where no other cause intervenes between the original act or omission * * * producing the resultant damage, negligence of the first wrongdoer is to be regarded as the proximate cause of the injury". (*Smith v. Smith-Peterson Co.*, 56 Nev. 79, 94, 45 P. 2d 785, 791.)

III.

The District Court Erred in Failing to Apply the
Doctrine Res Ipsa Loquitur.

The essence of this doctrine is that if the thing that caused the injury is under the exclusive control of the defendant and that which has happened is such as in the ordinary course of things would not have happened if those who had such control had used proper care, such facts afford inferred evidence, in the absence of explanation by the defendant, that the damage was caused by the defendant's negligence. (*Union Pac. R.R. Co. v. De Vaney*, 162 F. 2d 24, 26 (9 Cir.); *Johnson v. United States*, 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468; *Nyberg v. Kirby*, 65 Nev. 42, 69-78, 188 P. 2d 1006, 1022 (citing Cal. cases); *Hospital Assn. v. Gaffney*, 64 Nev. 225, 233-237, 180 P. 2d 594, 600 (citing Cal. cases).)

Here the uncontradicted evidence is that the appellee was in complete control of the tests “* * * it was near an isolated, closely guarded and secret site * * *” [Pre-trial Order, Par. 4, R. 12]; that the activities were of such a nature that the full details of the directives and instructions were restricted and full disclosure was refused upon such ground [R. 226-228; Title 42, U. S. C., Secs. 1810(a), (b)(1).] Having laid the uncontradicted foundation that the buildings were extraordinarily strong in construction, that there had been neither curative cracks, temperature change cracks nor settlement cracks, the cracking of this plaster was of such a nature that it wouldn't have happened excepting through negligence on the part of Appellee's employees in conducting the test

atomic explosions. At we have already shown, appellee has made no rational explanation which would absolve it from negligence.

“* * * because of the obvious difficulty of proof, a number of cases have aided the plaintiff by invoking the doctrine of *res ipsa loquitur* (citing cases).” (3 Okla. L. Rev., p. 25.)

Nor is it necessary that Appellant exclude every other possibility that the injury was caused other than by Appellee's negligence (although we believe Appellant has done so in this record.) (*Seneris v. Haas*, 45 Cal. 2d 811, 291 P. 2d 915.)

Appellee, as defendant in complete control of the isolated, secret test operation was required to meet or balance this inference of its negligence and, this it failed to do. (*Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 691, 268 P. 2d 1041.)

The law is clearly established that the doctrine of *res ipsa loquitur* applies to explosion cases. (22 Am. Jur., Explosions and Explosives, Secs. 95-96, pp. 212-214, and cases cited.) Furthermore the fact that Appellant proved some negligence by Appellee's agents does not foreclose application of this doctrine. (*Freitas v. Peerless Stages*, 108 Cal. App. 2d 749, 756, 239 P. 2d 671; *Roselip v. Raisch*, 73 Cal. App. 2d 125, 135, 166 P. 2d 340.) We submit that this is a case in which the doctrine was peculiarly applicable, and to refuse to apply it was reversible error.

IV.

The District Court Erred in Adjudging That Appellee Was Not Liable to Appellant Upon the Ground That the Acts of Appellee's Agents Were Performed in the Exercise of Discretionary Functions Within the Exclusionary Provisions of Title 28, U. S. C., Section 2680(a).

In paragraph I of its Conclusions of Law [R. 29] the District Court held:

"That the activity here involved, the detonation of experimental nuclear devices, requires the exercise of discretionary functions within the meaning of the term used in Section 2680 of Title 28, United States Code, and sovereign immunity obtains for that reason."

Just as the facts in this case involve matters which have only begun to be considered by the Courts, judicial interpretation of Title 28, U. S. C., Section 2680(a) has changed materially between the date when the complaint within was filed and the date of this brief. At the time when the complaint was filed (Dec. 2, 1952) the *Dalehite* decision had not been made by the Supreme Court (*Dalehite v. United States*, 346 U. S. 15, 73 S. Ct. 956, 97 L. Ed. 1427), but it was decided before the trial. As a result, the trial court was considerably influenced by the following language in the *Dalehite* case (p. 36):

"Where there is room for policy judgment and decision there is discretion. It necessarily follows that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."

However, as reported by the Fifth Circuit in *Fair v. United States*, 234 F. 2d 288, 291:

“In the meantime the Supreme Court has rendered three decisions under which the reach and effect of the Act have been extended in keeping with the attitude it had expressed as early as the *Yellow Cab Case* in 1950. (U. S. v. *Yellow Cab Co.*, 340 U. S. 543, 71 S. Ct. 399, 95 L. ed. 523.)”

The Fifth Circuit then goes on to cite and refer to *Williams v. United States* (350 U. S. 857, 76 S. Ct. 100, 100 L. Ed. 68) which reversed this court's decision reported in 215 F. 2d 800; the *Indian Towing* case (*Indian Towing Co. v. United States*, 350 U. S. 61, 76 S. Ct. 123, 100 L. Ed. 90) and the *Union Trust v. Eastern Airlines* case (*United States v. Union Trust* and companion cases, 350 U. S. 907; 76 S. Ct. 192, 100 L. Ed. 125). In the *Yellow Cab* case the Supreme Court said (p. 550):

“the proceedings (in Congress) emphasize the benefits to be derived from relieving Congress of the pressure of private claims. Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of waiver by the U. S. of its sovereign immunity from suit, it is inconsistent to whittle it down by refinement.”

In the *Indian Towing* case the majority opinion had reversed the Fifth Circuit and held that such lower court had erred in finding the government immune from tort liability arising out of negligence at the operational level upon the ground that the activity was governmental and not of a kind which could be or was carried on by private individuals. The majority opinion directed attention to the fact that the liability in tort imposed by Title 28, U. S. C., Section 1346(b) was not “to the same extent

as would be imposed on a private individual 'under the same circumstances' but that the statutory language is 'under like circumstances.' ”

While the facts involved in the *Indian Towing* case were such that the provisions of subsection (a) of Section 2680 were not directly involved, the four judges who dissented expressed their conclusion as to the intent of the majority in that decision as follows (p. 76):

“The over all impression from the majority opinion is that it makes the government liable under the Act for negligence in the conduct of any governmental activity on the ‘operational level.’ It seems broad enough to cover all so-called ‘uniquely governmental activities.’ ”

Referring to this statement in the dissenting opinion, the Fifth Circuit, in *Fair v. United States*, comments (p. 292):

“It is further worthy of note that the minority in *Dalehite*, whose dissent was indicative of the desire to give broad extent to the Tort Claims Act, had become the majority in *Indian Towing*. A reading of the opinions and dissents in the two cases leads to the conclusion that *Indian Towing* represents a definite change in attitude on the part of the Supreme Court.”

The Fifth Circuit then holds (p. 294):

“The government is liable for the actions of its employees dealing directly with the public in the application of established policies, even if such employees are vested with a measure of discretion and such liability of the government for their acts and omissions in all of the respects mentioned is measured by the same rules as the local law applies to a private employer under like circumstances.”

The Fifth Circuit then cites an earlier decision of the Eighth Circuit (*Dahlstrom v. United States*, 228 F. 2d 819) and says that said court in that case “rejected the idea that the government was protected by the exemption from the negligent exercise of discretion at the operational level.”

In the *Dahlstrom* case, *supra*, the Eighth Circuit, after reviewing the foregoing Supreme Court decisions, stated that Title 28, U. S. C., Section 2680(a) should be interpreted as follows (p. 821):

“When the government, at planning level, determines programs, plans, specifications or schedules of operations, it is exercising immune discretion and any activity pursuant to such plan does not give liability under the Act. But if the government, at the operational level, acts either contrary to the plan or in a manner not required by the plan, then the activity would not be discretionary and redress can be had for the resulting injury.”

We believe that this summary and interpretation quoted from the *Dahlstrom* case is completely supported by the foregoing cited decisions and is the correct present interpretation of the Tort Claims Act, and, particularly, of the immunities provided for in Title 28, U. S. C., Section 2680(a).

Applying such interpretation to the facts disclosed in the record here, it is clear that the trial court has erred and that Appellee is not absolved from liability by said immunity section.

The evidence is conclusive that decisions made at *planning level* were mandatory and unalterable and those who actually conducted the operations in the field had *no discretion whatever* with respect to performance thereof.

Congress had both *authorized* (Title 42, U. S. C., Sec. 1806(a)(1)), and *directed* (Title 42, U. S. C., Sec. 1803(a)(3) and (b)) that these atomic bomb tests be made as experiments to develop military application of atomic energy. When Congress so provides government agents have *no* discretion (*Arenas v. United States*, 322 U. S. 419, 427, 64 S. Ct. 1090, 88 L. Ed. 1363).

General Fields testified: (1) that the primary object of these tests was military [R. 213], (2) that the number, type, expected yield and method of detonation of the shots and the amount of fissionable material to be used, were fixed at planning level [R. 221] and (3) could not be deviated from [R. 222, 234, 235]. He also testified that this was true of both tests here involved [R. 242] and that the discretionary authority of the Test Manager was no greater than that of an army truck driver who was operating under fixed instructions [R. 235-236].

Dr. Graves testified substantially the same [R. 190-191, 194-195]. Dr. Cox testified that the only discretion which the testing officials had, in the field, was to delay the test if weather conditions were unfavorable [R. 294].

It was the duty of those making the tests, at the *operations level*, to determine if weather conditions were acceptable [Graves, R. 193] and if they were temporarily unfavorable they could defer the test [Graves, R. 201; Field, W-9, R. 232; Cox, R. 294]. Testing of weather conditions was primarily the job of Dr. Cox [R. 284, 293-294] and he could have been very accurate had he used the equipment available to him [Cox, R. 267-271, 279, 306,

307], but not as to a particular direction if he had no station (microbarograph) in that direction [R. 300-301].

In failing to place a microbarograph to the north [R. 266] or to calculate (graph) the weather conditions and probable pressure of the explosions in that direction [R. 266], Dr. Cox was permitting a condition to exist where he could not predict or report the weather and wind conditions [R. 300-301] and this deviated from the direction and plan at planning level. This was negligence and was not the exercise of discretion which is excluded by Title 28 U. S. C., Section 2680(a). (*Dahlstrom v. United States* (8 Cir.), 228 F. 2d 819, 821; *Somerset Sea Food Company v. United States* (4 Cir.), 193 F. 2d 631, 634; *Fair v. United States* (5 Cir.), 234 F. 2d 288, 294; and *cf.* Rogers, "Federal Tort Liability for Atomic Damage", Vol. 5, Journal of Public Law (1956), pp. 258 *et seq.* Emory University Law School.)

Certainly, the Congress has evidenced its opinion that the discretionary immunities of Title 28 U. S. C. Section 2680(a) do not apply to damages arising from these atomic explosion tests. First, it has approved and appropriated funds to pay this very type of claim pursuant to Title 28 U. S. C. Section 2672 [Pre-trial Order Par. 7-R. 13; Fields, R. 239-240; Ex. 38], and as General Fields testified, until this case arose, appellant had never rejected and disallowed such a claim upon the ground that the United States, through its agents, was exercising a discretionary function or duty [R. 241-242].

Also, in 1954, Congress increased the authority of the Atomic Energy Commission to pay money damages for

“* * * bodily injury or damage to real or personal property resulting from any detonation, explosion, or radiation produced in the conduct of the Commission program for testing atomic weapons * * *”.

increasing the limitations imposed by Title 28 U. S. C. Section 2672 from \$1000 to \$5000 (Title 42 U. S. C., Sec. 2207).

Certainly, one cannot suppose that Congress would make such provisions for payment of damages arising out of these unusual and extremely dangerous tests of the highest explosive forces produced by man if it was of the opinion that it had exempted the Federal Government from such liability by the provisions of Title 28 U. S. C. Section 2680(a). To the contrary, the Atomic Energy Commission has assumed that it incurred tort liability through its acts in exploding these atomic bombs and so reported to Congress and Congress has adopted its such construction by its appropriations (50 Am. Jur., Stats. Par. 337, pp. 328-330; *United States v. Freeman*, 3 How. (44 U. S.) 556, 564, 11 L. Ed. 724; *Polson Logging Co. v. United States* (9 Cir.), 160 F. 2d 712, 714-715.) Because of such error in holding that appellee was immune from liability, the judgment below must be reversed.

V.

The District Court Erred in Concluding That Appellee Was Not Liable to Appellant Under the Theory of Absolute Liability Arising Out of Appellee's Non-negligent Trespass, Through Air Shock Waves Caused by Atomic Explosions Upon, and Damage to, Appellant's Property.

In conclusion of law II the trial court states:

"That plaintiff cannot recover on the theory of liability without fault, as such liability is precluded under the Federal Tort Claims Act."

We believe that it is only fair to the trial court to state that our definition "absolute liability" may have tended to mislead, although it is Hornbook law that the remedy to be applied is governed by what is pleaded and proved and not by how the pleading is entitled.

Basically, appellant pleaded and proved a trespass, accomplished by shock waves, into and upon its property, which damaged such property. The issue presented by *count three* is as simple as that. It has been almost universally held that damage by concussion is just as much a trespass as damage by trespass of a physical object:

"In every practical sense there can be no difference between a blasting which projects rocks in such a way as to injure persons or property and a blasting which by creating a sudden vacuum, shatters buildings or knocks down people. In each case a force is applied by means of an element likely to do serious damage if it explodes * * *".

Exner v. Sherman Etc. Construction Company (2 Cir.), 54 F. 2d 510, 514.

“* * * and it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mr. Colton’s dwelling house or a concussion of the air around it, which had either damaged or entirely destroyed it.”

Colton v. Onderdonk, 65 Cal. 155, 159, 10 Pac. 395, 397.

To the same effect, see:

Bedell v. Goulter (Ore.), 261 P. 2d 842, 844.

It is well established that the United States is liable for damages resulting from trespasses under the Tort Claims Act:

“Petitioners rely upon the word ‘wrongful’ * * * as showing that something in addition to negligence is covered. * * * Rather, committee discussion indicates that it had a much narrower inspiration, ‘trespasses’, which might not be considered strictly negligence.”

Dalehite v. United States, 346 U. S. 15, 45-46, 73 S. Ct. 956, 972-973, 97 L. Ed. 1427, 1445;

Cf. United States v. Gaidys (10 Cir.), 194 F. 2d 762, 765;

United States v. Praylou (4 Cir.), 208 F. 2d 291, 293, cert. den. 347 U. S. 934.

and although such cases, with the exception of *Dalehite*, deal with airplane accidents, such liability has been held analogous to the liability arising from explosives.

Parcell v. United States, 104 Fed. Supp. 110, 116, 3 Okla. L. Rev. p. 15; 13 Neb. L. Bull., p. 377.

The Court below relied upon the following passage from the *Dalehite* decision (346 U. S. 15, 44-45):

“* * * there is yet to be disposed of some slight residue of theory of absolute liability without fault. * * * We agree * * * that the Act does not extend to such situations, though of course well known in tort law generally. * * * The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an ‘inherently dangerous commodity or property’, or of engaging in an extra-hazardous’ activity. * * *

“Petitioners rely on the word ‘wrongful’ though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; * * *”.

But in the *Dalehite* case the factual situation was *different*. In that case “there was need for further experimentation with FGAN to determine the possibility of explosion” (pp. 37-38) and there was no “knowledge of a danger, not merely possible, but probable, (and) * * * the entirety of the evidence compelled a view that FGAN was a material that former experience showed could be handled safely in the manner it was handled * * *” (p. 42).

To the contrary, in this case, it was known that the atomic bombs would violently explode, causing shock waves to proceed in all directions and that the action of these

waves could neither be prevented or controlled and that they could do wide spread damage. As Rogers states:⁵

“Even so, is *Dalehite* the proper case to be used as precedent? The factual situation in the atomic cases is markedly different. In *Dalehite* the evidence compelled a view that the explosive material was of a type that former experience had shown could be safely handled in the manner in which it was handled; thus, there was neither knowledge of nor intent as to the actual damage. In the atomic situation it was known that the bombs would explode violently, that the action of the shock waves could neither be prevented nor controlled and that they could do widespread damage; it was the purpose and intent of the experiments to determine the damage potential of the weapons being tested. Thus damage is clearly foreseeable in atomic explosions, but it was not foreseeable in the *Dalehite* situation.”⁵

Of course, the evidence here has disclosed definite misfeasance through Dr. Cox’s acts and omissions, but even if it had not this court judicially knows that shock waves would not have struck and damaged appellants property except as a result of negligence or misfeasance and, therefore, the rule of *res ipsa loquitur* will supply the missing direct evidence thereof.

We submit that the trial court’s conclusion II is in error and must be reversed.

⁵Rogers, “Federal Tort Liability for Atomic Damage”, Vol. 5, Journal of Public Law (1956), p. 261.

VI.

The District Court Erred in Adjudging That the Damaging of Appellant's Property by Appellee Was Not a Taking of an Interest in Appellant's Property for Which Appellee Was Liable Under the Provisions of the Fifth Amendment to the Federal Constitution and of Title 28, U. S. C., Section 1346(a).

As conclusion III the trial court held:

"That there was not a taking of the property of the plaintiff for a public use within the meaning of the Fifth Amendment to the Constitution of the United States."

This, we believe, was clearly erroneous. In fact, while we believe appellant should and will prevail in recovering from appellee for tort damage and for trespass damage, the facts in this case compel a conclusion that appellant's property was intentionally, partially destroyed and that such authorized, intentional, actions resulted in a partial taking for which it became liable under the Fifth Amendment and Title 28, U. S. C., Section 1346(a).

Here we have authorized, directed, mandatory and repeated acts [Title 42, U. S. C., Secs. 1803(a)(3) and (b), 1806(a)(1); R. 12-13, 25-29; Graves, R. 194-195, 199; Fields, R. 235-236] and while there was no intention to damage these particular buildings, there was express intention to do what was done with knowledge that it could not be controlled and that it might cause damage outside of the testing area and that, if it did, it would be compensated for [R. 13, 27, 28; Graves, R. 196, 198-199, 201; Field, R. 221, 238] and appellant's property was partially destroyed as a direct result thereof.

So far as we are informed this is a case of the first instance. No similar case has been brought against the United States and no case involving an implied taking through the means employed here has been tried or reported.

But under established principles of federal eminent domain law, there has been a taking for which the Fifth Amendment of the Federal Constitution requires the United States to pay:

1. Destruction, intentionally, by lawful authority and for public purposes, is a "taking."

United States v. Welch, 217 U. S. 333, 339, 30 S. Ct. 527, 54 L. Ed. 787, 789;

Duckett v. United States, 266 U. S. 149, 151, 45 S. Ct. 38-39, 69 L. Ed. 216, 218;

United States v. General Motors, 323 U. S. 373, 383-384, 65 S. Ct. 357, 362, 89 L. Ed. 311.

2. It is not necessary that the right "taken" be a recognized and defined real property estate, right or interest in order that it be compensable under the Fifth Amendment.

United States v. Land in Pleaston, California, 68 Fed. Supp. 279, 289;

Brooklyn Terminal v. United States (2 Cir.), 139 F. 2d 1007, 1011.

3. Here the taking (destruction) was a direct, to be anticipated, result of the shock waves. Hence the damages were directly and not consequentially caused.

United States v. C. B. & Q. R. R. (8 Cir.), 82 F. 2d 131, 136-137.

4. Such a taking by an authorized, executive agent of the United States creates an implied obligation of the United States to pay just compensation.

McGrath v. Cities Service Co. (2 Cir.), 189 F. 2d 744, 747.

It is the law that the intent required is an intent to do the thing which produced the taking, not a specific intent to take a specific interest in a specific property. If the Government act was authorized and the Government claimed no ownership right in the property affected, it is charged, in the same manner as a private citizen would be charged, with the *implied intent to do what it has done* and a “taking” has accrued.

United States v. Lynah, 188 U. S. 445, 464-465, 23 S. Ct. 349, 355, 47 L. Ed. 539, 546.

Here, the right asserted and “taken” is the right to repeatedly test high explosives which invariably produce shock waves which travel in all directions from the testing area and which are of such intensity that they have on one occasion (and may on other occasions in the future) reached and damaged plaintiff’s property. This, as Justice Holmes has stated: “Generated the same claim as other forms of deliberate withdrawal of the property from the admitted owner.” (*Keokuk Bridge etc. v. United States*, 260 U. S. 125, 126, 127.)

Furthermore, it is not the number of acts, but the character thereof, which determines whether or not there has been a “taking”:

“It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking * * *. The taking by condemnation

of an interest less than the fee is familiar in the law of eminent domain * * * and (when) it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking.”

United States v. Cress, 243 U. S. 316, 328-329,
37 S. Ct. 380, 61 L. Ed. 746.

It is respectfully submitted that the evidence in this case contains all of the elements necessary to establish liability of appellee for a partial taking through intentional, partial destruction of appellant’s property and for which there is an implied promise to pay, under the Fifth Amendment. Therefore, the determination of the lower court to the contrary is clearly erroneous and must be reversed.

Conclusion.

It appearing from the foregoing that the lower court has committed reversible error in each of the instances hereinbefore set forth and it further appearing that the uncontradicted evidence disclosed that appellant’s property has been damaged in the sum of \$5,000.00 or more [R. 136-137, 150-151] is respectfully submitted that the judgment of the lower court should be reversed *with directions* to enter judgment in favor of appellant and against appellee in the sum of \$5,000.00 together with interest and costs.

Respectfully submitted,

IRL DAVIS BRETT,

Attorney for Appellant.

No. 15141

**In the United States Court of Appeals
for the Ninth Circuit**

BARTHOLOMAE CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

BRIEF FOR APPELLEE

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FILED

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PAUL P. O'BRIEN, CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15141

BARTHOLOMAE CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, a California corporation which owns and operates a cattle ranch in a sparsely populated area located 150 miles northwest of the Atomic Energy Commission's Nevada Proving Grounds, brought this suit for damages against the United States in the U. S. District Court for the Southern District of California (Central Division) claiming that cracks which appeared in the plaster walls and ceilings of four of its ranch buildings were caused by the firing of atomic weapons during a series of atomic tests in the fall of 1951. The complaint (R. 3-10) alleging jurisdiction under both the Federal Tort Claims Act and the Tucker Act, contains four "counts," the first asserting

liability on the theory that the atomic weapons were detonated in a negligent manner, the second asserting liability under the doctrine of *res ipsa loquitur*, the third seeking recovery under the doctrine of absolute liability, and the fourth on the ground that there was a "taking" under eminent domain principles. The answer, as amended (R. 8-10, 16), denies negligence and the other material allegations and asserts that the claims are barred by the discretionary function exception of the Tort Claims Act, 28 U. S. C. 2680 (a).

Following a trial before District Judge William M. Byrne, judgment was entered for the United States on December 22, 1955 (R. 30-31). The District Judge's Memorandum Decision (R. 17-23; 135 F. Supp. 651) and his Findings and Conclusions (R. 23-30) hold that the evidence shows no negligence, that the claims are based upon the performance of discretionary functions and therefore are excluded from the coverage of the Tort Claims Act, that there can be no recovery under that Act on an absolute liability theory, and that there was no taking of appellant's property within the meaning of the Fifth Amendment of the Constitution. Appellant filed a notice of appeal on February 16, 1956 (R. 31). This Court's jurisdiction rests on 28 U. S. C. 1291. The facts may be stated as follows:

1. Background: the planning and authorization of the 1951 atomic tests

In the fall of 1951 the Atomic Energy Commission conducted a series of nuclear experiments at its Nevada Proving Grounds, commonly known as

Frenchman's Flat. The primary purpose of these experiments was to secure information needed for the design of new and improved nuclear weapons (R. 189, 237). As part of this test series, four atomic devices were detonated during the period from October 22 through November 5, 1951 (R. 24-25, 183). Recommendations concerning the initiation of this particular test series, the nature of the experiments, the size of the devices, the number to be detonated, the site of the explosions and their approximate dates were considered, authorized and approved at the very highest executive level. Thus, these matters were the subject of consideration and approval by the Atomic Energy Commission, by special advisory committees associated with AEC, by the Secretary of Defense, by the Secretary of State, by the National Security Council, by specialized committees within the National Security Council, and by the President himself.

a. Establishment of the Nevada Proving Grounds

Selection of the Nevada Proving Grounds, which is roughly 150 miles southeast of appellant's ranch,¹ as the site for nuclear explosions similarly involved decisions at the highest level, including Presidential approval. Earlier atomic experiments had been conducted in the Pacific, at Bikini Atoll and at Eniwetok, but it soon became evident that a testing ground in the continental area would be of great advantage to the nation in terms of speeding up atomic weapons

¹ Cf. App. Br. p. 6, fn. 1.

development.² Other important advantages of a continental testing site related to substantial savings in manpower, time and money (R. 172-173).³ The home site testing grounds also have important advantages to civil defense officials and provide opportunities for public education and understanding of the problems and hazards involved.⁴ A further factor involved relates to the conduct of foreign affairs.⁵

² R. 170; see *Assuring Public Safety in Continental Weapons Test* (U. S. AEC, 1953), pp. 79-82 (Pltf's Exh. 34).

³ To set up tests in the Pacific area necessitates sending thousands of military, civilian and AEC personnel to overseas locations where they remain tied up for many months. Thus, the tests in the Pacific during 1951-1952 required the services of some 9000 persons; the tests at the Nevada Proving Grounds during the same period required less than 2500. *Assuring Public Safety, supra*, p. 82. A scientist or technician going to the Pacific is not available to the home laboratory for a long period, and the work at the home laboratory suffers in consequence, whereas the scientist or technician who participates in a test at Nevada can return to the laboratory on the next day, and it is possible to evaluate the data from one detonation in time for the results to affect the next (*ibid.*; R. 172-173).

In terms of the saving of public funds, it is estimated that the cost of a Pacific operation would be about three times as much as one in continental United States (R. 172). Additionally, the Pacific operation in effect requires the building of a laboratory, whereas the laboratory is already in being at home. Furthermore, the laboratory equipment which is available at home often cannot be moved, or if it can be moved might not operate as efficiently under Pacific and tropical conditions. Additionally, removal would cause the interruption of work going on at home in which the same equipment is needed (R. 173-174).

⁴ *Assuring Public Safety, supra*, at p. 82.

⁵ Thus, when the international situation is tense or with the outbreak of war (as in the case of the Korean War) atomic experimentation in the Pacific may be highly inadvisable and

For these and other reasons, it was decided in 1950 to establish a continental test site. A survey of possible locations for such a site had been made in 1947. A new survey was made in 1950, and the Nevada site was chosen as most feasible. At that time the site was already a portion of an Air Force bombing range; it was only a few hours distance by air from the key laboratories engaged in the nuclear weapons development program; the relative isolation of the area provided safety factors in relation to blast and fall-out, particularly because the prevailing winds blow from the test site for many miles across a relatively unpopulated region; and, careful review of all research and test data indicated adequate assurance of public safety.⁶ The determination was made by the Atomic Energy Commission in collaboration with the Department of Defense (R. 212). The determination was reported to the Special Committee on Atomic Energy of the National Security Council which is made up of the Secretary of Defense, the Secretary of State, and the Chairman of the Atomic Energy Commission. The National Security Council approved the determination and recommended it to the President who authorized the establishment of the Nevada Proving Grounds as an area in which nuclear explosions would be conducted.⁷

dangerous. Shipping virtually irreplaceable equipment overseas at such times would involve great risks and might encounter problems of shipping and manpower shortages (R. 171, 174).

⁶ *Assuring Public Safety, supra*, at pp. 80-81; R. 174-175.

⁷ R. 25-26; Affidavit of Walter J. Williams, Deputy General Manager of the Atomic Energy Commission, p. 1. This affi-

b. Planning and authorizing the atomic tests

The Los Alamos Scientific Laboratory is the Atomic Energy Commission's atomic weapons development laboratory. It has, among its functions, the responsibility of planning and conducting nuclear weapons tests (R. 165).⁸ Each year the Laboratory prepares an Annual Program listing various items as to research, experimentation, nuclear tests, detonations, a description of those tests and their approximate dates, which are proposed for the coming year or possibly for the next two years (R. 176). The proposal for the atomic weapons test series such as are the subject of this case originate in such a Program prepared by the Los Alamos Laboratory (R. 25-26). The pro-

davit was submitted in support of the Government's motion for summary judgment below and, although comprising part of the Record in this Court, was not printed. Appellant does not dispute the facts as to the determination of the site or as to the need for a continental testing site. See R. 212; see also R. 174-175.

⁸ Testimony concerning the planning and carrying forth of the nuclear experiments which are the subject of this suit was given by three officials who rank high in our nation's atomic energy program: Dr. Alvin Cushman Graves, who, among his other important roles relating to nuclear development, headed the Division within the Los Alamos Laboratory which was responsible for atomic weapons testing (R. 164 *et seq.*); Brig. Gen. Kenneth E. Fields, who was Director of the Division of Military Application of the AEC, a position established by the Atomic Energy Act of 1946 (see 42 U. S. C. (1952 ed.) 1802 (a) 4 (B)) (R. 210 *et seq.*); and Dr. Everett Cox, one of the country's foremost experts in the field of blast effects, who is Manager of the Weapons Effects Department of the Sandia Corporation, an AEC ordnance laboratory and development organization (R. 242 *et seq.*).

posals are submitted by the Laboratory to the Director of AEC's Santa Fe Operations Office, which is an AEC field office exercising direct supervision over the work at the Los Alamos Laboratory (R. 168-169, 176). After consideration, the proposals are then submitted by that office to AEC's Division of Military Application which, after study and comment, transmits them to the Atomic Energy Commission. The Commission sends the proposals to its Military Liaison Committee and to its General Advisory Committee (R. 176-177).

The composition, functions, and powers of these Committees are provided for in the Atomic Energy Act of 1946, 42 U. S. C. 1802 (b) and (c). In brief, the Military Liaison Committee, composed of specialist representatives of each of the military Departments, after studying the proposals from the military aspect, obtains the approval or comments of the Department of Defense; the General Advisory Committee, composed of civilian scientists and technicians appointed by the President, considers the proposals from a scientific, research and development point of view. After receiving the views of these two Committees, the proposals are approved or otherwise acted upon by the Atomic Energy Commission. *Ibid.*; R. 176-177.

As the time for a particular approved series of nuclear tests gets closer, the Los Alamos Laboratory submits a specific proposal for that particular test series. This will include the recommendations as to the series previously included in the Annual Program,

but this time in much more detail. It will discuss the amount of fissionable material required in its tests, its geometry, and it will justify each of the tests by indicating what is proposed to be learned and what the effect will be on the national arsenal of nuclear weapons. This detailed proposal proceeds through the same channels as the Annual Program, as described above. Upon the determination by the Atomic Energy Commission that the particular series of nuclear explosion experiments is necessary, it reports to the Special Committee on Atomic Energy of the National Security Council the general purpose of such experiments, the number of detonations to take place in the series, the approximate dates on which the series will take place and the approximate amount of fissionable material to be consumed. Thereafter, the matter is referred, with the recommendations of the National Security Council, to the President himself, and it is the President who actually approves and authorizes the particular nuclear explosion experiments.⁹

The procedures discussed above were followed in this case; the President and the Atomic Energy Commission authorized the nuclear explosions which took place in the fall of 1951 and directed that the testing be done at the Nevada Proving Grounds (R. 26).

2. Conducting the nuclear explosion experiments

After approval by the President, the detailed proposals for a particular test series are transmitted by

⁹ R. 177; Affidavit of Walter J. Williams, *op. cit.*, *supra*, fn. 7, at p. 1.

the Commission to a Test Organization with instructions to proceed with the tests.

a. The Test Organization

Following these approvals, the Commission delegates authority to the Manager of the Santa Fe Operations Office to act as Test Manager and to conduct the tests. The Test Manager directs the Test Organization and has over-all responsibility for the operation. Under his direction, the Test Organization prepares a detailed proposal which specifies exactly what will be done in the conduct of the experiments and how it will be done. This detailed proposal is submitted to the Atomic Energy Commission and if it is approved that is the way in which the operation is conducted (R. 177). The Test Manager not only determines the schedule of operations to be followed, but he also determines the precise time at which the detonations will occur. His decision that everything is in readiness and that weather conditions are suitable for firing the particular shot is made after consultation with technical advisors concerning meteorological and other conditions. The Test Manager in this instance was Carrol L. Tyler.¹⁰

The official, under the Test Manager, who is responsible for actually firing the atomic devices when instructed to do so, is the Test Director. In this instance the Test Director was Dr. Alvin Cushman Graves, a highly qualified physicist of the Los Alamos Laboratory who had been closely associated with

¹⁰ R. 26, 177, 181-183, 232; Affidavit of Walter J. Williams, *Op. cit.*, *supra*, fn. 7, at p. 2.

AEC's experiments for many years (R. 164-168, 179). As Test Director, he planned and conducted the hundreds of experiments which necessarily precede each detonation; he planned operations in connection with each shot; he was responsible for on-site and off-site radiological safety; and he was chairman of an Advisory Panel of scientists and experts which meets prior to each shot to consider the various factors involved in determining whether and when the particular shot should be fired (R. 179).

The Advisory Panel convenes approximately 12 hours before each shot is scheduled to be fired and remains on duty continuously until shot time considering weather data, fall-out data, blast prediction data, etc. The panel is composed of some of the nation's most qualified experts.¹¹ After being briefed on and after a discussion as to the weather, wind, meteorological and related conditions up until shot time, the Panel recommends to the Test Manager whether the shot should or should not be fired. The Test Manager,

¹¹ Dr. Graves, the Chairman of the Panel, testified that in the October-November 1951 test series, "The panel at the time consisted of Dr. John Bugher, who is Chief of the Division of Biology and Medicine of the Atomic Energy Commission; Dr. Howard Andrews of the United States Public Health Service; Benjamin Holtzman, * * * one of the most competent meteorologists in the country. Dr. Thomas Shipment, who is the head of the Health Division of the Los Alamos Laboratory. Dr. Walker Bleakley of Princeton University, who is recognized as one of the foremost authorities on shock waves and blast effects. * * * General James Cooney, who was with the Division of Military Application as a radiological safety officer * * *." R. 180. Dr. Everett Cox, a blast effects expert, also served with the Panel (R. 180-181).

who participates in the Panel's briefing and discussions, has the responsibility of making the final decision (R. 181-182, 215). While of course no one has authority to depart from the approved plan of operations (R. 222, 234-235), the Atomic Energy Commission relies upon the judgment of the Test Manager to determine when conditions are optimal for public safety in all the circumstances (R. 26, 28).

b. Public safety: the factors involved and the precautions taken

(i) Throughout all of the procedures described above, from the planning stage to the firing of the shots, public safety is a primary consideration. Under public safety criteria set forth by the Commission, each particular shot must be individually justified in terms of its value to the country as a whole; the yield (*i. e.*, the estimated release of energy) of each shot and of the aggregate of shots is carefully considered and designated in advance; the amount of radio-active fall-out is specified in maximum terms with persons outside of the proving grounds in mind; and each atomic device which is to be detonated is designed with the minimum yield possible consistent with obtaining the information sought by the experiment (R. 178-179, 185, 204-207).

The principal factors involved from the viewpoint of public safety relate to fall-out of radio-active materials, blast or shock waves, and the flash of light which accompany the nuclear explosion. What effect these factors will produce depends largely upon the prevailing weather conditions. For example, a very high wind velocity present at all elevations could bring

about hazardous fall-out at a considerable distance from the detonation point and under such conditions, of course, the shot would not be fired (R. 216-219). Similarly, the brightness of the light flash, and the heat it throws, which could injure the eye tissues if one looks directly at the fireball, will vary with existent atmospheric conditions.¹² In this case, appellant contends its property was damaged by blast waves.

The blast waves emanate spherically in every direction from the point of detonation. The waves which strike the ground are immediately reflected up, causing a second spherical front (R. 249, 27). Dr. Cox, the blast effects expert, explained that if the atmosphere were perfectly uniform—with no change in temperature or winds at higher elevations—the wave hemisphere would get larger and larger and the concentration of blast energy would decrease in proportion to the square of the distance from the point of detonation, thus, twice as far away the energy concentration would be one-fourth as great, three times as far away it would be one-ninth as great, and so on. But the atmosphere is not uniform; there are changes in temperature and the wind directions and velocities also vary at different elevations and distances. Blast waves travel more slowly in cool air than in warm air, and because of the variance in temperatures at different elevations, the blast waves may bend back toward

¹² See *Atomic Test Effects in the Nevada Site Region* (U. S. AEC, 1955), pp. 5-7 (Pltf's Exh. 31). Viewed at a distance of 6 miles, the flash of light from a nominal detonation is 100 times brighter than the sun (*Assuring Public Safety in Continental Weapons Tests*, p. 85 (Pltf's Exh. 34).

the earth. When that happens, there is a concentration of blast waves (and of energy) which focus upon one spot; they strike the earth at the focal point and then bounce up again, and this process may be repeated. Each successive bounce will normally be less intense than the last.¹³

The effect of the blast will, of course, be greater where the blast waves are focused into one area.¹⁴ The strength of the waves and the sharpness of the focus depend on the temperature and wind structure of the atmosphere (as well as on the yield and altitude of the shot itself).¹⁵ The creation of focal points, and their location, are affected by the atmospheric layers above the earth's surface, for these masses of air at different heights generally differ in temperature. The *troposphere* (the atmospheric layer from the earth's surface to an elevation of 6 miles) will create focal points at shorter distances apart than will either the *ozonosphere* (the atmospheric layer extending from 25 to 40 miles above the earth) or the *ionosphere* (the atmospheric layer upwards of 50 miles above the earth).¹⁶

At the state of scientific progress attained at the time of the 1951 test series, it was not possible to predict whether there would be a significant bending of the blast waves and, if so, just where it would occur

¹³ R. 249-255, 264, 271; *Assuring Public Safety*, *supra*, at p. 86.

¹⁴ Dr. Cox explained that the blast waves which were recorded at Las Vegas, Nev., in 1951, resulted from this focusing process; that the blast may have struck at a focal point one-third of the distance to Las Vegas, then bounced and struck at a focal point two-thirds distance away, and again at Las Vegas (R. 264).

¹⁵ See *Atomic Test Affects*, *supra*, at pp. 11-12.

¹⁶ See *Assuring Public Safety*, *supra*, at pp. 86-87.

(R. 27). However, Dr. Everett Cox had devised a method of predicting the blast pressures which might be anticipated at certain points. It was known that the probability of significant blast pressure at a distance of 150 miles resulting from low-level refraction was "very, very tiny" (R. 268-271). The problem at that distance is created by higher level refraction, *i. e.*, from the ozonosphere. Since weather data as to the ozonosphere is unobtainable (weather balloons did not reach that height), the method used was to set off, at the test site, a large number of one-ton explosive shots and to measure the pressures which the ozonosphere refracted down to earth. The refracted pressures were recorded on instruments known as microbarographs, which were placed in strategic areas located generally at points up to 150 miles away from the site of detonation. Then, approximately one hour before the nuclear detonation was scheduled to be fired, another such high explosive shot was set off; the readings obtained from that shot would be related to the readings previously recorded and, through a process of scaling upward, a prediction would be made as to the pressures which would be caused by the nuclear detonation (R. 272-273, 278-279).¹⁷

¹⁷ The prediction necessarily was based on the assumption that the high level atmospheric conditions would remain constant during the hour between firing the explosive and firing the atomic device. The time spread was needed to allow the sound waves to reach the recording instruments, to allow personnel to read the instruments and then communicate the data to the test site, to compute and analyze the data after it was obtained at the test site, and possibly to issue protective warnings to the populace in areas where fairly high pressures could be predicted

The information and predictions based upon the microbarograph readings and computations were submitted to the Advisory Panel for consideration along with up-to-the-minute reports of weather conditions submitted by a network of permanent and mobile weather stations situated throughout the general area (R. 179-183, 305-307; see *Atomic Test Effects, supra*, p. 37; see also *Assuring Public Safety, supra*, pp. 96-100).

(ii) At the time of the 1951 tests there were only eight microbarographs existent in the United States (R. 273). Everyone of these instruments was obtained, and they were placed at selected points to secure readings which, in the best judgment of the experts, would assure maximum safety for the greatest number of people. Dr. Cox testified (R. 294):

In August and through the test series of 1951 there were eight of these microbarographs available in the country. I borrowed all eight, and I needed to use discretion in placing the eight instruments to the best of my ability to give maximum protection to the greatest number of people. I was not able, with the eight instruments, to place an instrument at every farm house, ranch, that might be within the zone of receiving these pressures. I had to decide where I would place them to get the maximum protection for the maximum number of people.

(R. 275-276). A considerable margin of error could be expected, however, because of the nature of the scaling formula and because of the possible change in high elevation atmospheric conditions subsequent to the firing of the explosive (*ibid.*; R. 291-292; and see *Assuring Public Safety, supra*, at pp. 88-89).

With this objective, the microbarographs were placed in the direction of and within the heavily populated communities, *e. g.*, in Las Vegas, in Henderson, and in Boulder City, and none was placed to the north in the vicinity of appellant's ranch (R. 27, 294–296).

That there would be a series of nuclear detonations was, of course, widely publicized, through newspapers and other communications media, so that the explosions and the dates on which they would take place was a matter of common knowledge to all in the Nevada area (R. 124–125).¹⁸ As already noted, the atomic devices are designed to produce the minimum yield possible consistent with obtaining the information sought by the experiment (R. 178–179). The initial determination that it is safe to fire such a device, from the standpoint of people located at a distance, is made at the time the program itself is under consideration and is approved (R. 216). Public safety is one of the factors involved in determining whether the test should be made in the Pacific or at the Nevada Proving Grounds (R. 214, 218–219). In this instance, no serious hazard to the public was anticipated (R. 214), although it was anticipated that there might be some minor damage done outside of the limits of the test site (R. 221, 238). But such off-

¹⁸ All such tests are accompanied by advance notice to the public; helicopter and ground patrols, and posted notices, are used to warn desert migrants and hunters; public officials and health officers of communities which may be affected are alerted; civil defense organizations may be notified; through the Civil Aeronautics Authority, planes are routed away from the area; a nationwide radiation monitoring system operates to trace the fall-out; etc. See *Assuring Public Safety*, *supra*, pp. 99–100.

site damage would depend largely upon weather conditions, and elaborate precautionary measures, particularly with reference to weather prediction, were taken to avoid significant off-site damage (R. 305-307).

The firing of the nuclear device occurs, as we have already noted, only after the Test Manager, upon consultation with his Advisory Panel of technicians and scientists, determines that the conditions are optimum for public safety under all the circumstances (R. 28).

3. The contentions below and the decision of the district court

Appellant's ranch, consisting of some 350,000 acres and a dozen well constructed buildings, is located about 20 miles from the town of Eureka and some 150 miles northwest of the Nevada Proving Grounds (R. 24, 148, 151). Appellant contended below that cracks in some of the plaster walls and ceilings of 4 of the buildings, which allegedly appeared shortly after the October-November 1951 test series, were caused by blast waves, and that these cracks were not due to settling of the building or to "curing" of the plaster or to temperature changes (R. 133-135). Defense testimony, on the other hand, described the cracks, some of which were new and some old (R. 324), as "typical average plaster cracks" (R. 311) such as would develop in every building of like construction (R. 320) as a result of changes in temperature (causing expansion and contraction of the plaster) and as a result of settlement of the building (R. 318-319), or

as a result of a poor mix of plaster or a poor adhesion to the rock lath (R. 312).

Appellant argued below that Dr. Cox was negligent in placing the microbarographs in the populated communities (4 south of the test site, at Indian Springs, Las Vegas, Henderson, and Boulder City; 2 east, at Caliente, Nev., and St. George, Utah; 1 west, at Beatty; and 1 northwest, at Goldfield), but none north, in the vicinity of its ranch. Appellant also relied on *res ipsa loquitur*, on the doctrine of absolute liability, and on the contention that there had been a "taking" of its property.

The district court found that there was no negligence involved (R. 29); that, on the contrary, "every precaution for the public's safety was exercised, commensurate with the task to be performed, and the equipment and scientific knowledge available" (R. 28-29); and that appellant had failed to prove that the atomic detonations were the proximate cause of its damage (R. 29, 18). The *res ipsa loquitur* doctrine was held inapplicable since appellant had failed to establish what "thing" had caused the plaster cracks, and since plaster cracks ordinarily occur in the absence of negligence (R. 18, fn. 1). The court held that appellant's claims are based upon experimental and discretionary activity authorized at the highest level of Government and are barred by the discretionary function exception of the Tort Claims Act (R. 20-21, 29). Appellant's alternative arguments that recovery should be had on the basis of absolute liability and on the basis of a "taking" were rejected (R. 22-23, 29-30). This appeal followed.

STATUTES INVOLVED

The pertinent provisions of the United States Code, of the Federal Tort Claims Act, and of the Fifth Amendment of the Constitution are set forth in the Appendix, *infra*, pp. 75-76.

ARGUMENT

Introduction and Summary of Argument

It is difficult to point to any undertaking of the Federal Government which is as vital to the defense and security of our nation and which is as momentous a factor to the future economy and progress of our people, and of all peoples, as is the atomic energy development program. It is a matter of common knowledge that this program, which brought forth atomic weapons and thereby hastened the close of World War II and since then unquestionably has functioned as a potent influence in averting other major conflicts, has received priority consideration throughout the Government, has involved huge investments of public funds, and has occupied the time of tens of thousands of government and civilian personnel including the country's foremost scientists.¹⁹ The program is of such importance, the fissionable materials consumed in experimentation are so valuable, the dangers accompanying nuclear detonation are so awesome, that, as the evidence in this case showed, each significant step in the program is submitted to, is considered by, and receives the authori-

¹⁹ See *Assuring Public Safety*, *supra*, at p. 3, *et seq.*

zation and approval of executive officials at the very highest level, including the President himself.

The firing of the atomic shots which allegedly caused damage to appellant's property in this case was pursuant to a nuclear experimental program which was authorized and approved by the highest executive level of the Government after a consideration of all relevant factors including the possibility of damage beyond the test site, and the particular detonations complained of, as well as the manner in which the tests were conducted, were specifically designated by that program.

In these circumstances the Tort Claims Act may not be used as a vehicle to impose liability for resultant damages. The discretionary function exception, 28 U. S. C. 2680 (a), was inserted in the statute precisely for the purpose of "avoiding 'any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity,' merely because 'the same conduct by a private individual would be tortious'"; it was not intended to permit suit on claims based upon "the execution of a Federal project and the like"; it was not intended to provide a remedy for damages caused by discretionary acts "whether or not negligence is alleged to have been involved." *Dalehite v. United States*, 346 U. S. 15, 27, 29; *Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463*, pp. 25, 33.

In the present case it is unnecessary to consider the merits of appellant's claims as to negligence

(which the District Court nevertheless found to be without substance), for it is clear that the decision to detonate the nuclear devices in the manner it was done and under the prevailing conditions was made in the exercise of a discretionary duty. Accordingly, it is evident at the outset that the courts have no jurisdiction over the claim.²⁰

²⁰ That the exclusions of 28 U. S. C. 2680 are *jurisdictional* in nature is now firmly settled. Thus, in *Dalehite*, where the facts established that the claim was within the discretionary function exception, the Court held that "as a matter of law the facts found *cannot give the District Court jurisdiction* of the cause under the Tort Claims Act" (346 U. S. at 24; emphasis added). In the same case (346 U. S. at 31, fn. 25), it was stated that, "In *United States v. Spelar*, 338 U. S. 217, we held that our courts *did not have jurisdiction* to try a tort action for * * * an accident * * * in Newfoundland. This conclusion was reached because of the exception, § 2680 (k), of 'Any claim arising in a foreign country.'" In the recent decision of *United States v. Taylor*, 236 F. 2d 649 (C. A. 6, petition for certiorari pending), it was held that because a defense based on § 2680 is jurisdictional, it may be raised for the first time on appeal; an earlier decision *contra*, *Stewart v. United States*, 199 F. 2d 517 (C. A. 7), was not followed. Other cases viewing the defense of § 2680 to be jurisdictional include *Stepp v. United States*, 207 F. 2d 909, 910 (C. A. 4); *Gubbins v. United States*, 192 F. 2d 411, 413 (C. A. D. C.); *Coates v. United States*, 181 F. 2d 816, 817 (C. A. 8); *Grigalaukas v. United States*, 103 F. Supp. 543, 547 (D. Mass.), *aff'd*, 195 F. 2d 494 (C. A. 1).

This result plainly flows from the language of 28 U. S. C. 1346 (b) (*infra*, p. 75) which confers tort jurisdiction on the district courts "subject to the provisions of chapter 171 of this title", and § 2680 is an important part of chapter 171. The opening words of § 2680 are, "The provisions of * * * section 1346 (b) * * * *shall not apply to—*", and various excluded types of claims are then specified. Clearly, then, the claims specified

1. In our first point below we show that appellant's claim falls under the discretionary function exception. Preliminarily we discuss the nature and scope of the exclusion, pointing out that the words of the exception derive their meaning from the settled common law concept, reflected in many cases prior to enactment of the Tort Claims Act, that public officials and public bodies are not answerable in damages for the consequences of official conduct involving the exercise of judgment or discretion of a public character. One aspect of this rule is that governing bodies are not subject to suit for tort based upon defects in a plan for public works. The adoption of the plan is an exercise of deliberate discretion. Another aspect of the rule, firmly rooted in reasons of public policy, precludes a court or jury from substituting its judgment for that of an official upon whom the law imposes the duty of exercising his discretion. If the official is not performing a ministerial act, he is personally immune from suit based upon an alleged mistake of fact in the exercise of his judgment. In that connection, the pre-Tort Claims Act cases make no distinction whatever between operational and planning level conduct, such as appellant relies on here, but look instead to whether the act itself is discretionary as distinguished from being ministerial.

in § 2680 are not within the jurisdiction conferred by § 1346 (b).

This Court's decision in *Air Transport Associates v. United States*, 221 F. 2d 467, 470, holding that a defense based on § 2674 is not jurisdictional is not contra to the above cases, for *Air Transport* did not involve or consider § 2680 defenses. Cf. *United States v. White*, 211 F. 2d 79, at 82, fn. 3 (C. A. 9).

2. We then show that these settled principles have been adopted and applied under the Tort Claims Act, both before and since the *Dalehite* decision which itself illustrates the application of these two aspects of the rule. We show that appellant's claim in this case must fail under either of these aspects of the discretionary function principle. The series of atomic experiments included in this case is the type of Federal project which Congress had in mind when it wrote the discretionary function exception into the Act. The nuclear detonations allegedly causing the damage were conducted pursuant to detailed plans which were prepared by the Test Organization and which were adopted and approved by the Atomic Energy Commission. Appellant failed to establish any departure or deviation from these detailed plans. On the contrary, the record shows that the approved plans specified all of the pre-atomic shot functions and that these plans were carefully carried out.

We note below that the Atomic Energy Commission vested the Test Manager alone with the duty of determining when each shot was to be fired based on his judgment that weather conditions were such as to provide maximum public safety. The panel of experts, including Dr. Cox, were acting only in an advisory capacity to the Test Manager. The Test Manager's determination was an exercise of immune discretion. No inquiry may be made as to what factors he considered in making that determination, for to do so would be to review his exercise of judgment. The information supplied by Dr. Cox to the Test

Manager is relevant only if appellant is to be permitted to go behind the Test Manager's discretionary decision to see what factors determined that decision, and that should not be permitted. In any event, Dr. Cox was himself vested with discretion as to the manner of conducting his tests. His decision to locate his few microbarographs within the populated communities so as to give the maximum protection to the greatest number of people was known to the Test Manager and was itself an act of judgment involving considerations relating to the public interest. As such it is covered by the discretionary function exception.

3. We next discuss appellant's argument that the discretionary function exception does not apply to operational level conduct. We show that this limitation on the coverage of the exception finds no justification either in the language of the Act or in its legislative history, and that a careful reading of the Supreme Court decisions in the *Dalehite*, *Indian Towing*, and *Union Trust* cases indicates that that Court has never passed on the point. The determinative fact in the application of the exception is not the level of the official but the discretionary nature of his act, and this is confirmed by many decisions both prior to and under the Tort Claims Act. It is evident, nevertheless, that both the Test Manager and Dr. Cox were not, in their respective spheres, operational level officials.

4. Discussing the merits, we show in our second point that the trial judge's finding that there was no negligence involved is amply supported by the

record. Throughout the operation, assuring maximum public safety was a primary consideration. It was for that reason that the available microbarographs were placed near the most populated communities rather than in a sparsely populated area like that of appellant's ranch.

5. In the remaining points we demonstrate that the trial judge was correct in holding that *res ipsa loquitur* is not applicable on the record made here, in holding that there can be no liability under the Tort Claims Act on an absolute liability theory, and in holding that there was no "taking" in the constitutional sense.

I

Appellant's claim is barred by the discretionary function exception of the Tort Claims Act

A. The nature of the discretionary function exception

Repeatedly described in Congress as "a highly important exception",²¹ the discretionary function exclusion marks one of the basic limitations on the otherwise broad coverage of the Tort Claims Act. It excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U. S. C. 2680 (a)). While we know of no decision which has attempted a comprehensive definition of the words

²¹ See H. R. Rep. No. 2245, 77th Cong., 2d Sess., p. 10; Sen. Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H. R. Rep. No. 1287, 89th Cong., 1st Sess., pp. 5-6.

“discretionary function or duty,” it is known that these words have long been familiar to the law. As used in the Act, they express a “concept of substantial historical ancestry in American law” (*Dalehite, supra*, 346 U. S. at 34); Congress deliberately chose them “with the intent that they should convey the same meaning traditionally accorded by the courts” (*Coates v. United States*, 181 F. 2d 816, 818 (C. A. 8)). Accordingly, guidance in determining the nature of the exception and its application should be sought initially in the non-Tort Claims Act cases which have applied the discretionary function principle in the past, and these cases are legion.

We shall discuss below, first, the principles set forth in certain of these non-Tort Claims Act cases, and, second, the application of these principles in decisions under the Tort Claims Act.

1. *The non-Tort Claims Act cases*

Long before enactment of the Tort Claims Act, the discretionary function concept had developed meaning from cases in three areas: (1) mandamus or injunction actions to compel performance of discretionary duties (*e. g.*, *Marbury v. Madison*, 1 Cr. 137, 170; *Decatur v. Paulding*, 14 Pet. 497, 514, 515); (2) damage suits against public officials for performing authorized acts involving the exercise of judgment and discretion (*e. g.*, *Kendall v. Stokes*, 3 How. 87, 97, 98; *Spalding v. Vilas*, 161 U. S. 483, 498; *Gregoire v. Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949); and (3) actions against municipalities for injuries resulting from the performance of certain

governmental discretionary functions (*e. g.*, *Barrett v. State of New York*, 220 N. Y. 423, 116 N. E. 99). The controlling principle to be drawn from these three bodies of law is that it is not the place of the courts to revise, supervise or control executive conduct involving the exercise of judgment, choice or discretion of a public character.

Through the years, it has been the consistent holding of the courts that, despite injury to the plaintiff, the courts will not direct or enjoin or review the conduct of an official when that conduct involves the exercise of his judgment or discretion, as distinguished from conduct which is merely ministerial. Otherwise, the courts would be substituting "their judgment or discretion for that of the official entrusted by law with its execution" (*Louisiana v. McAdoo*, 234 U. S. 627, 633), and that "would be productive of nothing but mischief" (*Perkins v. Lukens Steel Co.*, 310 U. S. 113, 131-132). Even where suit is permitted against a government, none will lie if the cause is based upon the exercise of discretionary powers (*cf. Weightman v. The Corporation of Washington*, 1 Black 39, 49; *Turner v. United States*, 248 U. S. 354, 358). When it exercises a discretionary governmental function "for the benefit of the public at large, * * * no one can complain of the incidental injuries that may result" (*Barrett v. State of New York*, 220 N. Y. 423, 427, 116 N. E. 99, 100).

While the discretionary function principle has been applied in a variety of situations, here we direct attention to two in particular: (1) its application in

connection with the design of public works or projects—with which the atomic experiment program is readily identifiable—and (2) its application in connection with official conduct, not ministerial in character, where it is the duty of the officer to exercise his judgment and discretion. Concerning the first: cases involving states and municipalities uniformly have held that the governing body is not liable for damages to an individual for any defect or fault in the plan or design of public projects (like dams, sewers, or highways), because the adoption of the plan involves “the exercise of deliberate judgment and large discretion * * * and the exercise of such judgment and discretion * * * is not subject to revision by a court or jury in a private action” (*Johnston v. District of Columbia*, 118 U. S. 19, 20–21; and see cases collected in 90 A. L. R. 1502).

As to the second type of situation, time and again, in non-Tort Claims Act cases, the courts have held the discretionary function principle to be an absolute bar to imposing liability on the official himself for the untoward or harmful consequences of some decision made in exercising the duties of his office, where inherent in such duties were the factors of judgment, choice, selection and discretion—and in refusing to impose liability the courts have regarded as immaterial charges that the official was negligent or even that he acted with a malicious or other improper motive.²² If the act complained of “was done within

²² Cabinet officers—*Kendall v. Stokes*, 3 How. 87; *Spalding v. Vilas*, 161 U. S. 483, 498–9; *Standard Nut Margarine Co. v. Mellon*, 72 F. 2d 557 (C. A. D. C.), certiorari denied, 293 U. S.

the scope of the officer's duties as defined by law, the policy of the law is that he shall not * * * be liable * * * because of a mistake of fact occurring in the exercise of his judgment or discretion," and the reason for the rule "is simply one of public policy. 'Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public

605; *Glass v. Ickes*, 117 F. 2d 273 (C. A. D. C.), certiorari denied, 311 U. S. 718; *Gregoire v. Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; the Comptroller of the Currency, a United States Attorney and his assistant—*Cooper v. O'Connor*, 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643; Members of the Securities and Exchange Commission—*Jones v. Kennedy*, 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665; a member of the Tariff Commission—*Smith v. O'Brien*, 88 F. 2d 769 (C. A. D. C.); a member of the Parole Board, the warden of a Federal Penitentiary, and the Director of Federal Prisons—*Lang v. Wood*, 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; Selective Service Board officials—*Gibson v. Reynolds*, 172 F. 2d 95 (C. A. 8), certiorari denied, 337 U. S. 925; *Dodez v. Weygandt*, 173 F. 2d 965 (C. A. 6); Army officers and subordinate bureau chiefs—*De Arnaud v. Ainsworth*, 24 App. D. C. 167 (C. A. D. C.), error dismissed, 199 U. S. 616; *Burns v. Spiller*, 161 F. 2d 377 (C. A. D. C.), certiorari denied, 332 U. S. 792; a District Director of the Immigration and Naturalization Service, Immigration, Officer in Charge and Immigration Inspector—*Papagianakis v. S. S. Samos*, 186 F. 2d 257 (C. A. 4), certiorari denied, 341 U. S. 921; *Gregoire v. Biddle*, *supra*; District of Columbia Commissioners—*Brown v. Rudolph*, 25 F. 2d 540 (C. A. D. C.), certiorari denied, 277 U. S. 605; officers of the Home Owners' Loan Corporation—*Adams v. HOLC*, 107 F. 2d 139 (C. A. 8); police officers—*Laughlin v. Garnett*, 138 F. 2d 931 (C. A. D. C.), certiorari denied, 322 U. S. 738; a deputy fire marshal—*Phelps v. Dawson*, 97 F. 2d 339 (C. A. 8); and subordinate government attorneys—*Yaselli v. Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503.

service' ” (*Cooper v. O'Connor*, 99 F. 2d 135, 138, 141-142 (C. A. D. C.), certiorari denied, 305 U. S. 643; see also, *Gregoire v. Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949, and the authorities cited in fn. 22, *supra*, pp. 28-29).²³

In view of appellant's argument here (App. Br. 18-23), it is important to note that this latter line of cases, which comprises one of the primary, if not the principal, non-Tort Claims Act sources for the meaning of the words “discretionary function,” draws no distinction as to the echelon or level at which the official acts. These cases do not say that his judgment is protected only if he is a planning official, but not if he is at a so-called operational level, and quite obviously many of the cases apply the principle of immunity to officials who cannot possibly be regarded as planning officers (see fn. 22, *supra*). What the

²³ The immunity given to the official in connection with the negligent or wrongful performance of his discretionary duties is in no way intended to condone his improper conduct. The official is subject to disciplinary action by his superiors and he may be punished by some form of public prosecution, but not by way of a civil action by those who have suffered damage in consequence of his default in duty. Cf. *South v. State of Maryland*, 18 How. 396, 402-3. To permit an official's discretionary conduct to be reviewed in court at the instance of a private party “would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith”, and, on balance, the public interest is better served by leaving unredressed the wrongs of certain officials than to subject all “to the constant dread of retaliation” (Judge Learned Hand in *Gregoire v. Biddle*, *supra*, 177 F. 2d at 581).

courts have done is to examine and analyze the *function* and *duty* of the office, and if the function calls for the incumbent's exercise of judgment or discretion, the principle is held to apply even though the official is at what appellant would here characterize as the operational level. The distinction these cases draw is between discretionary and ministerial conduct, and not between operational and nonoperational level conduct. The emphasis is on the *function* being performed, and that is held controlling, not the level at which it is performed.

The same is true in suits against states and municipalities, as distinguished from suits against the officials personally: local governments are held immune from suit for negligence in connection with discretionary functions such as fire-fighting,²⁴ health and safety measures,²⁵ or traffic control,²⁶ or in other matters relating to the protection of life or property,²⁷ even though the negligence was by so-called operational level officials.

²⁴ *Rhodes v. Kansas City*, 167 Kan. 719; *Fisher v. City of Boston*, 104 Mass. 87.

²⁵ *Mead v. City of New Haven*, 40 Conn. 72; *Young v. State of New York*, 278 App. Div. 997, 105 N. Y. S. 2d 657, aff'd, 304 N. Y. 677, 107 N. E. 2d 594.

²⁶ *Ferrier v. City of White Plains*, 262 App. Div. 94, 28 N. Y. S. 2d 218.

²⁷ *E. g. Murrain v. Wilson Line*, 270 App. Div. 372, 59 N. Y. S. 2d 750, aff'd 296 N. Y. 845 (negligence in controlling a crowd); *Schuster v. City of New York*, 121 N. Y. S. 2d 735, aff'd, 286 App. Div. 389, 143 N. Y. S. 2d 778 (failure to provide protection to an individual after notice of threats upon his life); *Brogan v. Philadelphia*, 346 Pa. 208, 29 A. 2d 671 (failure to protect a traveller from dangerous conduct of others on a highway); *Savage v. D. of C.*, 52 A. 2d 120 (D. C. Mun. App.)

The question of whether an official is at an operational level as opposed to a planning level is of significance, it would seem, only as a guide in applying the other line of cases we have discussed, that is, those dealing with negligence in the plan or design of public works. If the negligence can be traced to the design or plan of the works, there is no liability, for the planning of public works requires the exercise of judgment and discretion involving factors relating to the public interest. If, on the other hand, the negligence occurs in the mechanical execution of the plan, there may be liability. Cf. *Johnston v. District of Columbia*, *supra*. But the reason is that the operational level function of executing the plan normally does not require such an exercise of judgment; it is a function which is ministerial in character, and the courts so hold (see cases cited at 90 ALR 1512-3).

There can be situations, however, in which an operational-level employee may be vested with discretion, too, even where public works are involved. And, if

(police broke into and took possession of plaintiff's house and belongings); *Giordano v. City of Asbury Park*, 91 F. 2d 455 (C. A. 3), certiorari denied, 302 U. S. 745, 799 (false arrest); *Borough of Norristown v. Fitzpatrick*, 94 Pa. 121 (failure to halt firing of a cannon in street); *O'Rourke v. Sioux Falls*, 4 S. D. 47, 54 N. W. 1044, 19 LRA 789 (same); *Trower v. City of Louisiana*, 198 Mo. App. 352, 200 S. W. 763 (same); *City of New Orleans v. Abbagnato*, 62 Fed. 240 (C. A. 5) (failure to prevent a lynching); *The Nez Percé Tribe of Indians v. United States*, 95 C. Cls. 1, 9-11, cert. den. 316 U. S. 686 (failure to prevent removal of gold from tribal land); *Turner v. United States*, 51 C. Cls. 125, 153, aff'd, 248 U. S. 354 (failure to prevent destruction of property); cf. *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 291.

that is the situation, there can be no liability for the negligent exercise of discretion. Thus, the overall plan of a public project may be silent as to the design of some particular aspect of the project and broad discretion may be delegated to a subordinate official, say the supervising engineer on the scene, to work out and adopt the plan of this particular phase of the work. Where that occurs the operational-level employee is, to the extent that he creates the plan himself, on a planning level. Similarly there may be situations during the execution of a public project involving an exercise of discretion which has no direct relationship to the physical plan of the project itself. For example, an official on the site of construction involving a secret installation may be vested with power to prohibit travelers from entering a particular area or from using a road from which the secret work can be observed while the work is going on. Invoking such a prohibition manifestly would be a discretionary act and, in legal principle, more appropriately would fall under the second line of cases discussed above (pp. 28-31), rather than the first (p. 28).

This, we think, suggests one of the inadequacies of the use of the term "operational level conduct" as an all-inclusive test for application of the discretionary function principle. The true test of immune discretion is the nature of the official's duty, not the level or echelon of his office. If it is his duty to exercise judgment and discretion, and his function is not, in the traditional sense, a ministerial one, he is not answerable in damages for a mistake of judgment.

The cases referred to in fn. 22, at pp. 28–29 above, demonstrate this. See also, *infra*, pp. 52–57.

2. The Tort Claims Act cases

The cases decided prior to enactment of the Tort Claims Act demonstrate plainly that the words “discretionary function” constitute a long familiar formula in the jurisprudence holding governing bodies, and their employees, free from liability for mistakes in judgment in connection with their public duties. This basic principle, firmly settled at common law, was carried into the Tort Claims Act through the discretionary function exception. Giving the words of that exception their traditional meaning, as Congress intended and as the courts have held (*supra*, p. 26), indicates that the United States cannot be held liable (1) where the individual official or employee is himself immune from liability, because of the performance of a discretionary act, (2) where an injunction or mandamus to compel performance of the act in question would be refused on the ground that the function involves judgment or discretion, or (3) where a city or state would not incur liability because the particular function is regarded as discretionary.²⁸

²⁸ While the *Indian Towing* decision, 350 U. S. 61, 65, rejected the idea that the Tort Claims Act incorporates the governmental v. proprietary principles of municipal corporation law, that decision did not deal with the problem of discretionary functions, which of course is a distinct matter. Thus, *Indian Towing* in no way suggested that municipal law cases holding a city immune for defects in the plan of public works are not applicable to the United States under the Act.

The legislative history of the Act and specifically of the discretionary function exception, which are extensively reviewed in the *Dalehite* decision, 346 U. S. 15, confirms this approach. That history reveals an acute Congressional awareness, and intention, that certain areas of governmental conduct should not be the subject of governmental liability under the Act, even though such conduct may result in damage to an individual. As to such matters, the Government has withheld its consent to be sued, and the doctrine of sovereign immunity, although it has been greatly diminished by statute in recent years and especially through this Act, is still an insurmountable barrier.²⁹ The legislative history establishes beyond any question that Congress intended the exception to bar suit not only when the claim is footed on an official's act of judgment, but also when the claim challenges "the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act * * *". The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, *the execution of a Federal project and the like*" (346 U. S. at 27; emphasis added).

²⁹ Congress recognized that because of the exceptions and exclusions of the Tort Claims Act there would still be occasion for the private bill remedy—in instances of hardship or moral obligation or in other equitable situations where the terms of the statute barred recovery. See, e. g., Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Sen., 76th Cong., 3d Sess., on S. 2690, pp. 34, 38, 39, 52–53; Hearings before Subcommittee No. 1 of the Committee on the Judiciary, H. of Reps., 76th Cong., 3d Sess. on H. R. 7236, pp. 15, 22.

The *Dalehite* case is, of course, the leading decision on the application of the exception.³⁰ There, after discussing the legislative background of the exception, and after pointing out that the words cover “not only agencies of government * * * but *all* employees exercising discretion” (346 U. S. at 33; emphasis added), and, further, that the discretion covered includes “the discretion of the executive or the administrator to act according to one’s judgment of the best course” (346 U. S. at 34), the Supreme Court stated that “it is unnecessary to define, apart from this case, precisely where discretion ends” (346 U. S. at 35). “It is enough to hold,” the Court said (pp. 35–36), that—

the “discretionary function or duty” that cannot form a basis for suit under the Tort Claims Act includes *more* than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules

³⁰ *Dalehite* was a test case involving personal and property claims resulting from the disastrous explosion at Texas City, Tex., of fertilizer grade ammonium nitrate (FGAN). The FGAN had been produced for the United States pursuant to a program designed to increase the food supply of devastated areas in occupied enemy countries following World War II. The United States undertook the program to meet its obligation as an occupying power and to dispel the dangers of internal unrest. 346 U. S. at 17, 19. The district court made findings of negligence, first, with regard to the manufacture, bagging, and shipment of a dangerous product, *i. e.*, the FGAN (346 U. S. at 23, 37–42, 46–47), and second, with regard to the conduct of the Coast Guard in policing the shipboard loading of the dangerous substance and in fighting the fire which later developed (346 U. S. at 23–24, 42–43).

of operations. *Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680 (a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion. [Emphasis added.]

Applying this definition to the issues before it, the Supreme Court concluded that each of the following governmental decisions challenged by the plaintiffs in that case were discretionary: (1) the cabinet level decision to institute the fertilizer (FGAN) export program (346 U. S. at 37); (2) the decision as to whether further experimentation with FGAN was needed to determine the possibility of its explosion under conditions likely to be encountered in shipping (*id.* at 37-38); (3) the drafting of the basic "Plan" of manufacture of the FGAN (*id.* at 38-42); and (4) the failure of the Coast Guard to regulate and police the storage or loading of the FGAN in some different fashion (*id.* at 42-43).³¹

³¹ The close parallel with the present case should be noted in passing. The decision in *Dalehite* to institute the FGAN program is analogous to the decision in this case to institute the atomic test series; the drafting of the plan to manufacture the FGAN in *Dalehite* is analogous to the plan, in this case, for the conduct of the tests; and the decision in *Dalehite* against further experimentation with FGAN is directly analogous to the decision in the present case against using one of the eight microbarographs to record the pressures of the preliminary high

In its application of the discretionary function exception the *Dalehite* opinion certainly did not reject, but on the contrary, expressly adhered to the historical meaning of the phrase as developed in the non-Tort Act cases. Clearly, insofar as the decision denied liability for asserted defects in the basic plan, it was consistent with the public works cases discussed above. Plainly, insofar as it denied liability for allegedly wrongful decisions by officials vested with discretionary duties, it was consistent with the second line of cases we discussed above. And, manifestly, insofar as it denied liability for alleged wrongful acts in regulating and policing the storage, and in fire-fighting, traditional principles were being applied. The short of it is that the *Dalehite* interpretation and application of the discretionary function language fully adopts, rather than delimits or departs from, the settled meaning of the words as developed in the non-Tort Act cases.³²

explosive shots in the sparsely populated area of appellant's ranch.

³² Even the dissent was in basic agreement as to the principles involved; the disagreement was principally in their application to the facts. The dissent would have imposed liability under the rule that while a governing body "may not be held for its decision to undertake a project, it is liable for negligent execution" (346 U. S. 59); the dissent argued that, in shipping a dangerous article, the Government, like a private manufacturer, was obligated to ascertain its dangerous propensities and to give warning of the dangers, and that having failed to do so, it executed that phase of the project negligently (*id.*, 53, 55-6). The dissent *rejected* the argument, *which really underlies appellant's contention here*, that application of the exception should be governed "not by whether an act was discretionary but by who exercised the discretion" (346 U. S. at 58, fn. 12). Moreover, the dissent fully accepted the view that,

There has been no decision by the Supreme Court since *Dalehite* which has, in any way, modified these views as to the nature or scope of the discretionary function exception. *Indian Towing Co. v. United States*, 350 U. S. 61, involving the negligent operation of a lighthouse, did not as the Court itself noted (350 U. S. at 64), relate to this aspect of § 2680 (a), but instead dealt with the interpretation of § 2674 of the Act.³³ *United States v. Union Trust Co.*, 350 U. S. 907, involving the negligent operation of an airport control tower, summarily affirmed the decision below (221 F. 2d 62) on the authority of *Indian Towing*.³⁴

“The exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official” (id., p. 60), citing such cases as *Gregoire v. Biddle* and *Spalding v. Vilas*, the doctrine of which we have discussed above, pp. 28–31.

³³ *Indian Towing* was a claim based upon alleged negligence of the Coast Guard in failing to keep the light burning in a lighthouse. Moving to dismiss the complaint, the Government argued that its liability under the Tort Claims Act was limited to that of “a private individual under like circumstances” (§ 2674), that there could be no liability of a private individual in like circumstances because the operation of lighthouses has always been, since the beginning of our country, an exclusively and uniquely governmental activity, just as is the maintenance of the army. Dividing 5 to 4, the Supreme Court rejected that argument, and held the Government liable on the theory that one who undertakes to warn another of danger and thereby induces reliance must perform his Good Samaritan task carefully. Insofar as *Dalehite* dealt with § 2674 (see 346 U. S. at 42–44), it was said to be distinguishable. 350 U. S. at 69.

³⁴ In *Union Trust*, the Government argued similarly that the operation of airport control towers to warn and regulate interstate air commerce was a uniquely governmental activity, without private counterpart, hence that the claim failed to meet the

Insofar as these two cases refer to the operational-level-planning-level dichotomy, we discuss them further below, pp. 52-57. In *Hatahley v. United States*, 351 U. S. 173, 181, involving the destruction of Navajo Indian horses by federal employees, the Supreme Court stated that, "We are not here concerned with any problem of a 'discretionary function' under the Act, [for which] see *Dalehite v. United States*."

The lower courts, on the other hand, both before and since *Dalehite* have applied the exception generally in accordance with the principles stated in the *Dalehite* decision. A brief description of some of these cases will serve to illustrate the types of claim under the Act which have been held barred by the exception. We have set out these cases in the margin below.³⁵ It will be observed that these cases

analogous private liability test of § 2674. The Court of Appeals found comparable private activity in privately operated towers (221 F. 2d at 74). In affirming *per curiam* on the authority of *Indian Towing* (without arguments or briefs on the merits), the Supreme Court made no mention of the discretionary function exception aspect of that case.

³⁵ First we mention illustrative cases which may be analogized to the non-Tort Act public works cases, and, as to those, of particular interest in the light of the facts in the present suit are a group of decisions which were briefly explained and approved in the *Dalehite* opinion itself (346 U. S. at pp. 36-37, fn. 32). These include *Boyce v. United States*, 93 F. Supp. 866 (S. D. Ia.), where, in the words of the Supreme Court (346 U. S. at 36-37), the plaintiff "charged that he had suffered damage by virtue of certain governmentally-conducted blasting operations. The United States, by way of affirmative defense, showed that the blasting had been conducted pursuant to detailed plans and specifications drawn by the Chief of Engineers who, in turn, had been specifically delegated 'discretion of the broadest character' to draft a plan for deepening the Mississippi River channel. The exception was applied."

fall broadly within the two categories of non-Tort Act cases we have discussed above (*supra*, pp. 26 *et seq.*), *i. e.*, cases involving public works and cases involving official conduct, not ministerial in character, where it is the duty of the officer to exercise his judgment.

In *Olson v. United States*, 93 F. Supp. 150 (D. C. N. D.), plaintiff's livestock were lost when the flood gates of a dam were opened; the exception was held applicable, and the Supreme Court (346 U. S. at 37) approvingly noted the holding below that "*when flood waters are to be released and how much water is to be released certainly calls for the exercise of judgment*" (emphasis in original). Similarly, a claim based upon the release of flood waters at Bonneville Dam was held barred by the exception in *Lauterbach v. United States*, 95 F. Supp. 479 (W. D. Wash.). See also, *Coates v. United States*, 181 F. 2d 861 (C. A. 8) (§ 2680 bars claim for damages resulting from negligently changing the course of a river); *North v. United States*, 94 F. Supp. 824 (D. Utah) (§ 2680 bars claim for damages resulting from a government dam raising the level of ground water); *Toledo v. United States*, 95 F. Supp. 838 (D. P. R.) (§ 2680 bars a claim based upon the falling of a rotted tree maintained for experimental purposes).

Other typical Tort Act cases roughly within the public works or public project category are *Sickman v. United States*, 184 F. 2d 616 (C. A. 7), certiorari denied, 341 U. S. 939, where the exception was held applicable to a claim based upon depredations by migratory waterfowl permitted to congregate in vast numbers in a sanctuary maintained under authority of the Migratory Bird Treaty Act, 15 U. S. C. 703; *Harris v. United States*, 205 F. 2d 765 (C. A. 10), where the decision of the Fish and Wildlife Service and of the Corps of Engineers to destroy a willow growth on Government lands by the use of a herbicide sprayed from an airplane was held to involve a discretionary function; and, in *United States v. Ure*, 225 F. 2d 709, 711 (C. A. 9), this Court held the exception applicable to the decision as to how to construct a canal.

Cases illustrating the other category, that is, the situation in which it was the duty of the official to exercise his judgment in performing the functions of his office, include *Denny v. United*

B. Appellant's claim arises out of the performance of discretionary functions and duties

Under either aspect of the rule discussed above, the discretionary function principle bars recovery in this case. Appellant's claim is based upon damage allegedly caused by blast waves resulting from the detonations of atomic devices. While appellant does not challenge, as indeed it cannot, that the decision initiating the nuclear test program, and that the decision

States, 171 F. 2d 365 (C. A. 5), certiorari denied, 337 U. S. 919, where a claim based upon the failure of the Army to furnish medical and hospital services to a soldier's wife was rejected on the ground that the pertinent statute (10 U. S. C. 96) and regulation provided for such services "whenever practicable"; *Chournos v. United States*, 193 F. 2d 321 (C. A. 10), certiorari denied, 343 U. S. 977, where the Government was held not liable for the action of a range manager in denying a grazing permit for public lands; *Matveychuk v. United States*, 195 F. 2d 613 (C. A. 2), certiorari denied, 344 U. S. 845, where the exception was held applicable to a suit for losses resulting from an Office of Price Administration denial of a rent increase; *Schmidt v. United States*, 198 F. 2d 32 (C. A. 7), certiorari denied, 344 U. S. 896, which rejected liability for damages caused by the allegedly improper conduct of a Securities and Exchange Commission investigation; *Smart v. United States*, 207 F. 2d 841 (C. A. 10), where the determination of hospital authorities, in accordance with Veterans Administration regulations, to release an incompetent mental patient for a trial visit was characterized as the exercise of discretion; *Goodwill Industries of El Paso v. United States*, 218 F. 2d 270 (C. A. 5), denying liability for the failure of Federal employees to prevent a theft by not properly supervising migratory Mexican workers at a reception camp under the Migrant Labor Agreement; *Morton v. United States*, 228 F. 2d 431 (C. A. D. C.), where the discretionary function exception was held applicable to the determination of Federal officials that a prisoner should be transferred from the District of Columbia jail to the United States Medical Center in Missouri.

selecting the Nevada Proving Grounds as the site of the tests, were discretionary acts, appellant argues that there was negligence in the manner in which the tests were conducted. Specifically, appellant argues negligence in firing the shots without determining "if the existing weather conditions 'were, in fact, acceptable' " (App. Br. 12), and, particularizing further, appellant contends Dr. Cox (who did not make the final decision as to whether to fire the shots) was negligent in placing the eight available microbarographs in the direction of the more populated areas and cities, rather than to the north near its ranch (App. Br. 12, 23).³⁶

1. *There was no deviation from the approved plan*

While conceding that when the Government, "at planning level, determines programs, plans, specifications or schedules of operations, it is exercising immune discretion and any activity pursuant to such plan does not give liability under the Act" (App. Br. 21), appellant argues that Dr. Cox "deviated from the direction and plan at planning level" (App. Br. 23). *But the record does not establish any such deviation.* On the contrary, the record plainly establishes that the detailed procedures of conducting the tests, including all preliminary functions, had been worked out in advance and had been approved and adopted by the highest executive authority. Viewed as a whole,

³⁶Although appellant describes Dr. Cox's primary job as testing and calculating "weather conditions" (App. Br. 22-23), the fact is that his function was to predict, on the basis of weather forecasts and other data, what the blast pressures might be at great distances (R. 249).

the approval of the test series and of all its complicated preliminary preparations, was the equivalent of the adoption of a plan for a public works and was equally discretionary. It was the very kind of "authorized activity" or "federal project" (*Dalehite*, 346 U. S. at 29, 27) which Congress had in mind as being covered by the exception.

Apart from its bald assertion, appellant has failed to show that there was any departure from the approved plan. In that connection it should be borne in mind that the evidence must be viewed "in the light most favorable to the prevailing party, the burden being on the unsuccessful party to show that the evidence *compelled* a finding in his favor" (*Anderson v. Federal Cartridge Corp.*, 156 F. 2d 681, 684 (C. A. 8), emphasis added; cf. *Glens Falls Indemnity Co. v. United States*, 229 F. 2d 370, 373 (C. A. 9)). Here, the program for the 1951 atomic experiments, which was approved by top officials, set forth all of the significant elements with reference to the conduct of the experiments. The determination at the highest level was not merely a decision that atomic devices should be fired in Nevada, but embraced such factors as the number of nuclear devices to be detonated, the approximate dates of the detonations, the amount of fissionable material to be used, the yield (in terms of energy) to be produced, etc. *Supra*, pp. 6-11. These factors, plus the knowledge accumulated from past experience that, although no serious hazard was involved (R. 214), some minor damage might occur beyond the test site, where carefully weighed and con-

sidered by our country's foremost nuclear experts, and, with their views and recommendations in mind, the program was authorized and approved by the Atomic Energy Commission, by special committees established by Congress for just that purpose, by top military officials, by the Secretaries of State and Defense, by the National Security Council, and by the President himself (*supra*, pp. 6-11).

After the detailed program and schedule received these approvals, the Test Organization, which had the responsibility of conducting the tests and which was headed by Carrol L. Tyler as Test Manager, prepared an even more particularized proposal setting forth precisely the manner in which the tests would be conducted, with due regard to the safety criteria which had been set up, indicating the technical procedures to be followed, fixing the exact dates and times of the detonations, and specifying a set of experiments which would be done on the detonations (R. 177). This particularized proposal, too, was submitted to the Atomic Energy Commission, and only after its approval could the Test Organization proceed to execute them (*ibid.*).

With this last approval obtained, the approved details were then passed on to various components of the Test Organization. A memorandum of directions and instructions was issued which outlined the administrative method to be followed, specified the communications channels, fixed the sequence of firing the test devices, established the date and time of firing, "outlined the specific procedures for firing each shot and

provided a detailed schedule of functions to be performed during specified periods prior to, and following each shot" (R. 233). The preliminary high explosive shots, supervised and recorded by Dr. Cox, upon which appellant bases its claim of negligence, certainly must have been included in the functions planned to be performed prior to each shot. The placing of the microbarographs and other equipment at different spots many miles from the test site, the assignment and transportation of personnel to these distant locations to operate and read these instruments, the establishment of communication channels they used to rush the readings back to the test site, and the numerous related problems connected with Dr. Cox's work—which was but one phase of the entire operation preliminary to firing the atomic shots—obviously had to be planned and set up in advance and necessarily were included within the "specific procedures for firing each shot" and the "detailed schedule of functions to be performed during specified periods prior to" each shot (R. 233, 300–301). Not only does the record fail to show any deviation from the procedures and preliminary experiments which were detailed in advance, but the court below specifically noted in his findings of fact that the Test Manager—to whom the Atomic Energy Commission had delegated the overall authority to conduct the tests (R. 26)—as well as his board of experts *were fully informed as to the location of the microbarographs* (R. 28).

Thus it is clear that the case falls squarely within the confines of the *Dalehite* decision. As in that case,

the entire program—the plan, specifications and schedule of operations—were approved at the highest level, and those who carried out the program adhered to its mandate. “It necessarily follows that acts of subordinates [if Dr. Cox can be viewed as a subordinate] in carrying out the operations of government in accordance with official directions cannot be actionable” (346 U. S. at 36).

2. The decisions of the Test Manager and of Dr. Cox, on which appellant's claim is based, were made in the exercise of immune discretion

Even if it be assumed, contrary to the evidence, that the precise procedures used in the preliminary tests were not specified in the approved plan, appellant's claim must fail for there can be little question that the acts upon which the claim is based were performed in the exercise of immune discretion (see *supra*, pp. 28 *et seq.*).

a. In arguing that there was negligence in firing the atomic shots without determining if weather conditions were acceptable (App. Br. 12), appellant is really attacking the decision and judgment of the Test Manager. For the duty of deciding that weather conditions were optimal for public safety was not the duty of Dr. Cox; that decision had to be, and was, made by the Test Manager in the exercise of his judgment. The Test Manager alone had the authority and the responsibility of making that determination. The record and the findings of the court below permit no other conclusion (R. 26, 28, 181, 294) and even appellant concedes that there was discretion to delay

the firing if it was decided that weather and atmospheric conditions were not suitable (App. Br. 7).³⁷

The Atomic Energy Commission delegated to the Test Manager—the official directing the entire operation—the duty of fixing the precise moment when each shot was to be fired based on *his* judgment that weather conditions were most adaptable in the circumstances. It assigned to him a panel of the country's foremost scientists, including Dr. Cox, to supervise the gathering and the evaluation of the varied mass of scientific data which he needed to make that determination, but their function was primarily an advisory one. In making the decision, the Test Man-

³⁷ Appellant's assertion that the discretionary authority of the Test Manager "was no greater than that of an Army truck driver" (App. Br. 22) is little short of grotesque. And the assertion (*ibid.*) that General Fields so testified is not true; indeed, his testimony was quite the reverse. While General Fields testified that the Test Manager had no authority to deviate from the plan approved by the President and AEC, he went on to say: "I don't consider myself competent to say that the Test Manager is or is not analogous legally to an Army truck driver although *I have never considered that the Test Manager could be construed to be a truck driver in that sense*" (R. 236). His testimony was that the Atomic Energy Commission had "vested in Tyler [the Test Manager] over-all responsibility for the operation * * *. Tyler's responsibilities under the above authority included, but were not limited to: the security of the test operation; radiological safety, both operational and public in the local area; public information; obtaining military support and the conduct of observer programs. * * * [He was also given] overriding operational authority for the purpose of making minor changes necessitated by operational conditions" (R. 232). It should be noted, however, that even an Army driver may, in an unusual situation, be vested with discretionary authority, *e. g.*, to violate speed laws. Cf. *State v. Burton*, 41 R. I. 303, 103 Atl. 962.

ager had the benefit of their recommendation, *but the ultimate decision and responsibility was his alone*. As Dr. Cox testified, "I advise the Test Manager, and then it is his decision as to whether we go ahead and shoot, or whether we postpone" (R. 294; see also R. 181). That decision, as the record plainly demonstrates, was "the product of an exercise of judgment, requiring consideration of a vast spectrum of factors" (cf. *Dalehite*, 346 U. S. at 40); it was the Test Manager's "judgment of the best course" (*id.*, at 34). It was precisely the type of act which traditionally has been held to be discretionary. Where the claim rests upon official acts "in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution." *Louisiana v. McAdoo*, 234 U. S. 627, 633.

Not only does the law preclude a suit attacking "the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself" (cf. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 325), but it also precludes examination, at the suit of a private person, into the factors which the official considered and weighed in reaching his decision. The courts simply "will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination" (cf. *DeCambra v. Rogers*, 189 U. S. 119, 122; *Wann v. Ickes*, 92 F. 2d 215, 217 (C. A. D. C.)). If the rule were otherwise, the protection given

to discretionary acts would be nullified, for the discretionary determination could then be attacked indirectly under the guise of an attack on those subordinate officials who gather or furnish the information needed by the officer who makes the discretionary decision. The short of it is that there can be no inquiry behind the discretionary determination, whether that inquiry be addressed to motive or to the facts on which the determination was based.

It follows, first, that since the Atomic Energy Commission delegated to the Test Manager the responsibility and duty of exercising his judgment as to when conditions were most suitable for firing the particular shots, his determination in that regard was an immune discretionary act, and second, that no inquiry may be made at the instance of appellant as to what factors the Test Manager considered in making his determination, or as to what factors he ignored, or as to what advice or recommendations he received or credited, or as to how he reached his decision. Since his was a discretionary act, no recovery would be cognizable under the Tort Claims Act even if appellant had established (which of course is certainly not the case) that the Test Manager had negligently ignored either the pre-shot data supplied by Dr. Cox or the recommendations of some other member of the panel of experts. For, obviously, the discretionary function exception can come into play only when there is alleged negligence in the exercise of discretion (*Dalehite*, 346 U. S. at 33).

The information furnished by Dr. Cox, which appellant argues was negligently gathered, was but one

of many facts considered by the Test Manager in reaching his decision that conditions were suitable for firing the shots. Clearly the rule which precludes inquiry into the facts considered by the Test Manager in reaching his immune decision similarly precludes inquiry into whether those facts were prepared carefully. Cf. *DeCambra v. Rogers, supra*; *Wann v. Ickes, supra*. Since appellant cannot inquire as to what weight the Test Manager gave to the data furnished by Dr. Cox, no inquiry can be made into the nature of that data and the manner of its preparation.

b. Nevertheless, even if appellant is permitted to go behind the Test Manager's determination that "the testing was taking place under conditions optimal for public safety under all the circumstances" (R. 28), and if appellant is permitted to inquire into and to attack the manner in which Dr. Cox's data was obtained, the discretionary function exception still bars recovery in this case. For, Dr. Cox's role was not a ministerial one but in itself required the exercise of judgment and discretion. As an eminent scientist in the field of blast effects, Dr. Cox was a member of the panel of experts (R. 180-1); he was engaged in a consultant and advisory capacity (R. 293); his function was to advise the Test Manager with respect to the probable blast pressures in particular areas (R. 293-4). Clearly, his assignment was not a menial one. The Test Organization was relying upon him to exercise his best judgment in predicting the probable pressures in the inhabited areas.

As we have already indicated (*supra*, pp. 45-46), the record establishes that the details of his pre-

atomic-shot functions were submitted to and were approved by the Atomic Energy Commission. But if we ignore that fact, it is evident that Dr. Cox was given discretion to conduct his tests in the manner he believed best suited to obtain the information desired. It was because of his special expertise in this field that he was present. His work required the use of microbarographs, and there were only eight such instruments available in the country. In explaining the placing of those instruments at different sites, Dr. Cox testified, "I needed to use discretion in placing the eight instruments to the best of my ability to give maximum protection to the greatest number of people. * * * In each instance they were [placed] in communities" (R. 294, 296). This of course was an exercise of judgment, one which involved considerations of peculiar interest to the public. It was not an exercise of judgment akin to that of an Army truck driver in maneuvering his vehicle through traffic. Rather, it was an act of judgment, in effect a policy decision, by a public official as to what is the "best course" (cf. 346 U. S. 34) to assure maximum public safety in view of the limited facilities available. As such it falls directly within the exclusion of Section 2680 (a).

C. Application of the discretionary function exception does not depend on the distinction between operational level and planning level conduct

To avoid the reach of the discretionary function exception, appellant argues, first, that the exception does not apply to so-called operational level conduct, and, second, that the duties of the Test Manager and of

Dr. Cox were operational level duties (App. Br. 18-24). We seriously question the soundness of the first proposition, and we believe that the record controverts the second.

1. *The discretionary function exception is not limited only to conduct at the planning level*

A few recent decisions have seized upon the "operational level" versus "planning level" dichotomy as a quick and easy formula for solving the frequently difficult problem of application of the discretionary function exception.³⁸ These decisions drastically limit the scope of the coverage of the exception, apparently holding that discretionary acts of officials at the planning level are immune but discretionary acts of operational level officials are not. In the words of the dissenting Justices in *Dalehite*, who, like the majority in that case, rejected this view, the application of the exception would be determined "not by whether an act was discretionary but by who exercised the discretion" (346 U. S. at 58, fn. 12). This standard, based solely on the *echelon* of the official rather than on the *discretionary nature* of his conduct, has no justification whatever in the language of the Tort Claims Act. It has no warrant in the legislative history of § 2680 (a). It is directly contradicted by the pre-Tort Claims Act cases from which the meaning of the discretionary function phrase is derived. Moreover, far from clarifying the already difficult problem of application of

³⁸ See *Fair v. United States*, 234 F. 2d 288 (C. A. 5); *Dahlstrom v. United States*, 228 F. 2d 819 (C. A. 8); *United States v. Union Trust Co.*, 221 F. 2d 62, aff'd, 350 U. S. 907.

the exception, injecting this standard would in a great many cases compound that difficulty with additional confusion and vagueness because, necessarily, it immediately creates the further problem of setting up criteria for determining what activity is operational level and what is not.

To read § 2680 (a) with the sharp qualification this standard imposes requires the insertion of words which simply do not appear there, and their insertion is a legislative, not a judicial, function.³⁹ The plain meaning of the section, as it appears in the statute without the words appellant would interpolate, indicates a Congressional purpose to exclude claims based upon discretionary conduct without regard to the level of the officer or agency involved. It was the nature of the act, not level of the actor, which Congress was concerned about in adopting the exclusion. There is not the slightest intimation in the Congressional Committee reports explaining § 2680 (a) that only high level policy planning was to be immune (see the Committees' explanation set out in *Dalehite*, 346 U. S. 29-30 at fn. 21).

We have already shown that the traditional pre-Tort Claims Act discretionary function cases, from which the words of the exception derive their mean-

³⁹ Appellant would read § 2680 (a) this way: "The provisions of * * * section 1346 (b) * * * shall not apply to—(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government [*acting at a planning level*], whether or not the discretion involved be abused." But Congress did not insert the italicized words appellant reads into the section.

ing, do not draw any definitive distinction between discretionary acts at the planning level and those at the operational level (*supra*, pp. 28–34). We know, also, that there are many decisions under the Tort Claims Act which, consistent with the plain meaning of the exception, have held truly discretionary acts to be within the exception even if they are at an operational level.⁴⁰ On the other hand, the cases which appellant points to as adopting the distinction (fn. 38, *supra*, p. 53) make no analysis of the problems and offer no rationale—based on the language, purpose, or history of the statute—for reading the distinction into the Act.

The most recent case, *Fair v. United States*, *supra*, relies on the Supreme Court decisions in *Dalehite*, *Indian Towing* and *Union Trust*. We submit, however, that a careful reading of those three cases will disclose that the Supreme Court actually has never passed on the point. In *Dalehite*, the Supreme Court did *not* limit the exception merely to high level policy judgment and deny it to discretionary acts at the so-called operational level. On the contrary, after hold-

⁴⁰ Thus, it would be ludicrous to say that policy-forming determinations were involved in *Goodwill Industries of El Paso v. United States*, 218 F. 2d 270, 272 (C. A. 5) involving the failure of law enforcement officers to prevent a theft; or in *Chournos v. United States*, 193 F. 2d 321 (C. A. 10), certiorari denied, 343 U. S. 977, involving the denial of a grazing permit; or in *Matveychuk v. United States*, 195 F. 2d 613 (C. A. 2), certiorari denied, 344 U. S. 845, involving an OPA denial of a rent increase; or in *Denny v. United States*, 171 F. 2d 365 (C. A. 5), certiorari denied, 337 U. S. 919, involving the refusal to admit a soldier's wife to a hospital; or in *Morton v. United States*, 228 F. 2d 431 (C. A. D. C.), involving the manner in which a particular prisoner is confined or fed.

ing that the words of the exception cover "Not only agencies of government * * * but *all* employees exercising discretion" (346 U. S. at 33; emphasis added), the Court set out verbatim the plaintiffs argument on the point and then declined to accept the limitation, saying that, "It is unnecessary to define, apart from this case, precisely where discretion ends" (346 U. S. at 35).⁴¹

The *Indian Towing* decision, although it makes passing reference to *Dalehite's* mention of operational level conduct (350 U. S. at 64, 68), does not itself hold that § 2680 (a) is confined to discretion at the planning level. The discretionary function exception

⁴¹ Insofar as the Supreme Court held in *Dalehite* that claims arising from alleged Coast Guard negligence (in failing to enforce existing safety regulations, in failing to supervise the storage of the FGAN, and in failing to put out the fire) were not actionable, the Court was passing upon activities which obviously were operational level. These failures were not the result of "policy-forming" decisions, as was mistakenly declared by the lower court in *United States v. Union Trust Co.*, 221 F. 2d 62, 77 (C. A. D. C.).

The major portion of the *Dalehite* decision dealt with the public works aspect of the discretionary function exception, *i. e.*, the traditional exemption from liability which governing bodies have in connection with the planning of public projects, and it was in that context that the Court said, "The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program" (346 U. S. at 42). There was no suggestion that this distinction was to be injected in situations governed by the other line of cases we discussed above (*supra*, pp. 28-34), which the dissent alluded to when it said that, "The exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official" (346 U. S. at 60).

was not involved in the *Indian Towing* decision, and the Court so stated, 350 U. S. at 64. Nor is the Supreme Court's *per curiam* affirmance of the *Union Trust* case (see above, pp. 39-40) indicative of its acceptance of the operational level v. planning level distinction. The main thrust of the Government's argument in *Union Trust* dealt with the uniquely governmental nature of the activity involved and with the lack of private analogy required by § 2674 of the Act. This was the only subject of the *Indian Towing* decision. In affirming *Union Trust* summarily (without briefs or argument on the merits), the Supreme Court cited *Indian Towing* alone, thus indicating the ground of the affirmance, *viz.*, rejection of the uniquely governmental function argument.

We think it evident, therefore, that the Supreme Court has not held that the official's level or echelon determines the applicability of the discretionary function exception. We respectfully suggest that the lower courts which have read the Supreme Court's decisions otherwise have fallen into error. We submit that the determinative factor in the application of the exception is not the level of the official but is the discretionary nature of the act itself—whether “discretionary” be taken in the special sense it has acquired in the American law of public liability or in its more general connotation of “involving judgment.”

2. Neither the Test Manager nor Dr. Cox were operational level employees

The functions of both the Test Manager and of Dr. Cox have already been described at length (*supra*,

pp. 9-11, 14-16, 45-49). The Test Manager was the official who headed the Test Organization. He was in full charge of the entire program and had several thousand persons under his direction (see fn. 3, *supra*, p. 4). The Atomic Energy Commission had vested him with "over-all responsibility" for the conduct of the tests (R. 232). The Test Organization, which he headed, planned and prepared the particularized proposal setting forth the precise procedures, the administrative methods, the schedule of functions, etc., which were to be followed in conducting the experiments (R. 233, 177). Manifestly, his position was at a planning level. The record is clear that the detailed plans he and his organization prepared were submitted to and were approved by the Atomic Energy Commission (R. 177).

Dr. Cox, on the other hand, was the planning official within the more limited sphere of his work. It was he who had devised the pre-atomic-shot experiments. It was he who had planned and who later supervised their execution. It was he who had determined where the microbarographs were to be placed. While he worked under and subject to the direction of the Test Manager, it is plain, as we have already shown (*supra*, pp. 45-46), that the plan, the schedule, and the function of his experiments were also approved by the Commission before the test series were actually conducted.

II. The district court's findings that appellant failed to establish either that the United States was negligent or that the atomic detonations were the proximate cause of the damage to appellant's property were not clearly erroneous

The District Court found that, "Upon the evidence before it, this Court cannot find that any officer or employee of the United States was negligent in the performance of his duties relating to atomic experimentation, or that the atomic detonations were the proximate cause of the damage to plaintiff's property" (R. 29). To the contrary, the Court found that "every precaution for the public's safety was exercised, commensurate with the task to be performed, and the equipment and scientific knowledge available" (R. 28-29), and that, "In approving the detonation at the particular times and under the particular weather conditions then prevailing, the Test Manager determined that the testing was taking place under conditions optimal for the public safety under all the circumstances" (R. 28). These findings, which appellant is here challenging, may not, under Rule 52 (a) of the Federal Rules of Civil Procedure, be set aside unless clearly erroneous.

Under that rule, the findings of the trial court may not be disturbed unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Oregon Medical Society*, 343 U. S. 326, 339; *United States v. Gypsum Co.*, 333 U. S. 364, 395. As this Court said in *Glens Falls Indemnity Co. v. United States*, 229 F. 2d 370, 373, "It is not the function of this court to retry cases on appeal." If the evidence

before the trial court would support a finding either way, and the trial judge has decided it to weigh more heavily for one of the parties, the appellate court may not upset that determination because "such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'" *United States v. Yellow Cab Co.*, 338 U. S. 338, 342. In reviewing the record the appellate court must approach the evidence in the light most favorable to the prevailing party, for there is a strong presumption in favor of the trial court's findings. *Glens Falls Indemnity Co. v. United States*, *supra*; *Anderson v. Federal Cartridge Corp.*, 156 F. 2d 681, 684 (C. A. 8). Nor is the reviewing court free to substitute its judgment of the facts for that of the trial court. As stated by the Supreme Court, "It is not enough that we might give the facts another construction, [or] resolve the ambiguities differently * * *. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'" *United States v. Real Estate Boards*, 339 U. S. 485, 495-496.⁴²

⁴² Since the question of negligence is normally a question of fact to be determined by the trier of facts, *Wilkerson v. McCarthy*, 336 U. S. 53; *Chesapeake & O. Ry. Co. v. Coffey*, 37 F. 2d 320, 324 (C. A. 4)), the trial court's determination of negligence vel non is subject to the same rule and will not be disturbed unless it is "clearly erroneous." Suits under the Tort Claims Act are tried by the court without a jury (28 U. S. C. 2402); the findings at bar therefore are governed by these same principles. *United States v. Fotopoulos*, 180 F. 2d 631, 634 (C. A. 9); *United States v. Hill Lines, Inc.*, 175 F. 2d 770 (C. A. 5); *Wasserman v. Perugini*, 173 F. 2d 305 (C. A. 2).

It follows from these principles that the judgment below may not be overturned if the trial judge's findings are substantially supported by the evidence, have a rational basis, and are responsive to the issues and the applicable law. To upset the findings it will not suffice for appellant to show merely that the evidence would support an alternative or contradictory view; rather, it has the burden of establishing convincingly that the trial judge's findings reflect a mistaken view or misconception of the evidence and that the evidence unquestionably compels contradictory findings. Appellant cannot sustain that burden here. The record in this case amply supports the findings which the trial judge made.

1. In attacking the finding of no negligence, appellant relies solely and entirely on the fact that Dr. Cox did not place a microbarograph "to the north" of the test site to graph conditions there (App. Br. 8). But, in the first place, it is important to observe that Dr. Cox actually gave several predictions of the probable blast pressures before the firing of the shots, only one of which was based on data obtained from the microbarographs (R. 256-259). Thus, he gave blast pressure predictions based upon the weather data gathered by the network of weather stations, and based upon the weather prediction. He also gave blast pressure predictions based upon weather balloon soundings. Appellant completely ignores these predictions by Dr. Cox and, significantly, the record does not reveal that in making these predictions no heed was paid to weather conditions to the north of the test site.

Second, the evidence shows that the placing of the microbarographs, which Dr. Cox used in connection with still another series of predictions, was determined primarily by two considerations: (i) the limited number of such instrument available, and (ii) the desire to obtain maximum protection for the greatest number of people. The uncontradicted testimony was that at the time of the 1951 test series there were only eight microbarographs available in this country (R. 273, 294). Dr. Cox's testimony warrants being repeated: "I borrowed all eight, and I needed to use discretion in placing the eight instruments to the best of my ability to give maximum protection to the greatest number of people. I was not able, with the eight instruments, to place an instrument at every farm house [or] ranch, that might be within the zone of receiving these pressures. I had to decide where I would place them to get the maximum protection for the maximum number of people" (R. 294; and see R. 273). With that objective in mind, none of the microbarographs was placed within the proving ground itself; instead, each was placed within a community to the east, south and west of the proving ground (R. 295-296).

It should be noted also that Dr. Cox testified that he actually does not need a station to forecast the blast pressure focuses because they could be predicted on the basis of mathematical computations from the known weather data and from the known laws of physics relating to sound propagation. "I can compute this from the weather data," Dr. Cox said, "but

it is very nice to confirm it with instruments. Complexity and size of these instruments nearly prohibits the moving of them, so before the test series begins I have to locate my stations. The weather puts these focal points where it desires; *if a focus hits my station I have data; if it doesn't, I have no data*" (R. 300-301).⁴³

This evidence, plus Dr. Cox's testimony that it was his function to predict blast pressures in *inhabited* localities (R. 249), meaning communities with numbers of people rather than isolated ranches or farmhouses (R. 294), plus his testimony that because of the generally prevailing westerly winds the blast pressures in the area ranging from northeast to southeast of the test site (where most of the available microbarographs were in fact placed) are always larger than in other directions (R. 270), clearly demonstrates that the district judge's finding is fully supported by the record, even without reference to the other evidence relating to the elaborate precautions taken to assure public safety. Indeed, it would appear—in view of the few microbarographs available and in view of the paramount desire to protect the greatest number of people possible—that Dr. Cox would have been deficient in his duty if, instead of placing the microbarographs in the populated com-

⁴³ This shows that even if Dr. Cox had located a microbarograph near appellant's ranch, as appellant claims should have been done, it is entirely speculative whether it would have recorded any data to indicate a focal point there.

munities, he had placed one of them in the sparsely inhabited area of appellant's 350,000 acre ranch.⁴⁴

2. The testimony as to the cause of the cracks in the plaster walls of appellant's buildings was conflicting and contradictory. A witness for the Government who examined the cracks, and who was qualified as an experienced architect and construction engineer (R. 309), described them as "typical average plaster cracks" (R. 311). Some of the cracks were of the kind "that occurs only when there is a poor mix of plaster or a poor adhesion to the rock lath" (R. 312). His opinion as an expert, after studying the shape of the cracks and the construction of the building, was that the cracks resulted from settlement of the building and from changes in temperature (which causes plaster to expand and contract) (R. 317-319). He indicated that the cracks were such as would appear in time in every building of like construction, even very well-built ones (R. 319-320). Appellant, on the other hand, introduced testimony controverting this (*supra*, p. 17). The district judge, who saw and heard the

⁴⁴ The decision of the Test Manager to detonate the shots was made with full knowledge of the limitations with regard to the number of microbarographs available and the places where they were stationed (R. 28). The Test Manager, who alone had the responsibility of final decision, had to work with the knowledge and facilities available to him. It was for the Test Manager to determine whether or not the information furnished was sufficient, after being advised by Dr. Cox and the other experts on his advisory panel, to keep any danger to the public at large to a minimum. Thus, appellant's emphasis on the conduct of Dr. Cox is misplaced. It is the Test Manager who had the responsibility for the acts complained of, and his conduct was discretionary.

witnesses and who had the opportunity of observing their demeanor and of judging their credibility, resolved this issue against appellant. It cannot be said, therefore, on the basis of the record before the court and in conformance with the requirements of Rule 52 (a), that his finding as to proximate cause was clearly erroneous.

III. The doctrine of *res ipsa loquitur* does not apply

Appellant's argument concerning the *res ipsa loquitur* doctrine (App. Br. 16-17) is really an additional attack on the findings of fact presented in another manner. However, the conditions necessary for the application of the doctrine are not present in this case. Moreover, whatever procedural benefits flow from application of the doctrine were obtained by appellant below.

1. *Res ipsa loquitur* is simply a rule of circumstantial evidence. It permits the trier of the facts to make an inference of negligence in certain situations where the plaintiff has failed or is unable to establish negligence by direct proof. See, *United States v. Coffrey*, 233 F. 2d 41 (C. A. 9); *Prosser on Torts* (2d Ed.), pp. 199 *et seq.* To invoke the doctrine the plaintiff must prove the existence of two crucial facts: (1) that the defendant had exclusive control of the instrumentality or thing causing the damage, and (2) that the occurrence was of such a nature as ordinarily would not have happened in the absence of negligence by the defendant.⁴⁵ *Ibid.*; *Hospital As-*

⁴⁵ A third requirement is that the plaintiff himself be free of any conduct contributing to the accident. See *United States v. Coffey*, *supra*; *Prosser on Torts*, *supra*.

sociation v. Gaffney, 64 Nev. 225, 180 P. 2d 594; *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 456; 38 Am. Jur. 989.

Concerning the first of these requirements: There was conflicting evidence before the trial court as to what the "thing" was that caused the cracks in the plaster walls of the buildings. Appellant had introduced testimony in support of its contention that the cracks were caused by the nuclear blasts. The Government countered with convincing testimony to the effect that the cracks were caused by settlement of the buildings, by temperature changes causing expansion and contraction, etc. (See *supra*, p. 64). Faced with this conflicting evidence, the District Court properly could not, with the degree of certainty required in a typical *res ipsa loquitur* situation,⁴⁶ point to the "thing" which had caused the cracks in the building (R. 18, fn. 1), nor could it, therefore, make a finding as to exclusive control. Appellant had the burden of establishing this fact as a *sine qua non* to invoking *res ipsa loquitur*. It failed to meet that burden.

Concerning the second requirement: The District Court correctly observed that cracks in plaster may be caused by ordinary occurrences completely unrelated to negligence of the defendant in the course

⁴⁶ For example, there could be no doubt that the leg-burn complained of in *Hospital Association v. Gaffney*, *supra*, was caused by a hot water bottle in the plaintiff's bed; or that the hand injuries sustained by the plaintiff in *Escola v. Coca-Cola Bottling Co. of Fresno*, *supra*, were caused by an exploding pop bottle held by the plaintiff.

of detonating the atomic devices. It is a matter of common knowledge and experience, as the evidence showed, that cracks in plaster walls usually result from settling of the building, from temperature changes, from "curing" of the plaster, from an improper mix of plaster, from a poor adhesion of the plaster, from earth temblors, etc. Manifestly, where common experience establishes so many reasonable and probable explanations for the occurrence apart from negligence the case is not an appropriate one for application of the *res ipsa loquitur* doctrine.

2. In any event, the effect of the *res ipsa loquitur* rule is only that the facts of the accident themselves constitute a *prima facie* case which will permit an inference of negligence *but which do not compel it*. *Sweeney v. Erving*, 228 U. S. 233, 240; *Jesionowski v. Boston & Maine R. Co.*, 329 U. S. 452, 457. The doctrine is nothing more than a rule of necessity invoked, under prescribed conditions, to compel the defendant to come forward and explain his freedom from negligence. The rule, when properly resorted to, this Court said in *United States v. Ure*, 225 F. 2d 709, 711, "is predicated on negligence inferred from all the circumstances producing the loss, plus a failure of the party who controlled the destructive force to come forward with evidence peculiarly within his knowledge indicating that his negligence did not cause the loss." Even when the doctrine is applied, the plaintiff still has the "burden of proof as to negligence and proximate cause" (*United States v. Coffey*, 233 F. 2d 41, 44 (C. A. 9)), and it remains for the

trier of the facts to determine whether the preponderance of the evidence is with the plaintiff (*Sweeney v. Erving*, supra).

Actually appellant did obtain in the court below whatever significant procedural benefits are provided for under the *res ipsa loquitur* doctrine. Appellant's action was not dismissed for failure to establish a *prima facie* case. Judgment was not rendered for the United States at the close of appellant's case or on appellant's evidence alone. The Government did come forward with evidence explaining its freedom from negligence, and the court below, on the basis of the entire record, found that the inference of negligence (which the doctrine permits but does not compel) was not warranted. On the contrary, the court found affirmatively, on the basis of all the evidence, that every reasonable precaution for the public's safety was exercised and that no negligence was present.

IV. The Tort Claims Act does not permit recovery on the theory of absolute liability

1. "Count Three" of appellant's complaint (R. 5-6) asserts liability on the basis of absolute liability. The Tort Claims Act, however, permits liability only where there has been a "negligent or wrongful act or omission" of a federal employee, 28 U. S. C. 1346 (b). Recovery is permissible under the Act only under the doctrine of *respondeat superior*, which is a vicarious or derivative liability. See *United States v. Campbell*, 172 F. 2d 500, 503, certiorari denied, 337 U. S. 597. Absolute liability, based upon an ultrahazardous ac-

tivity, has no relationship to the *respondeat superior* doctrine. Liability for ultrahazardous activity is imposed not because an employee has committed a "negligent or wrongful act" for which he may be held liable to the injured person, but because the activity involved is one which, despite the exercise of all due care, poses a likelihood of injury. It is now settled beyond any question that the United States cannot be held liable under the Tort Claims Act on the theory of absolute liability for engaging in an ultrahazardous activity. Such is the decision of the Supreme Court (*Dalehite, supra*, 346 U. S. at 44-45), of this Court (*United States v. Ure*, 225 F. 2d 709, 711; *Rayonier Incorporated v. United States*, 225 F. 2d 642, 648), and of the Courts of Appeals in other Circuits (*United States v. Hull*, 195 F. 2d 64, 67 (C. A. 1); *Heale v. United States*, 207 F. 2d 414 (C. A. 3); *United States v. Inmon*, 205 F. 2d 681, 684 (C. A. 5); *Harris v. United States*, 205 F. 2d 765, 767 (C. A. 10)).

2. Apparently as an after-thought, appellant suggests in this Court that although it used the term "absolute liability" below it really was pleading a trespass. This assertion is certainly not warranted by the language of appellant's complaint.⁴⁷ In any

⁴⁷ The complaint clearly set forth a claim based on absolute liability and not trespass. Thus, Count Three is entitled "Absolute Liability: Claim for Non-Tortious Damages" (R. 5). A claim of trespass would, of course, be a claim for tortious damages, and could not be described as "non-tortious." But the Count specifies further, in Paragraph IV, that in detonating the atomic devices the United States was engaged in an activity which "was ultra-hazardous and necessarily involved a risk of * * * damage to property * * *". That such damage could

event, this Court's decision in the *Ure* case, *supra*, is dispositive. A similar argument was made there and this Court said (225 F. 2d at 711): "For present purposes, as the judge recognized, this doctrine [of trespass] is indistinguishable from the principle of absolute liability enforced in cases involving the employment of an inherently dangerous agency. In light of the holding in *Dalehite* this ground, too, must be rejected in cases brought under the Tort Claims Act."

V. The district court was correct in holding that there was no taking of appellant's property in the constitutional sense

Appellant's argument that if there was no negligence involved then there was a taking of its property for public use, compensable under the Fifth Amendment, is necessarily predicated on its view that the cracks in the plaster walls were caused by the atomic detonations. The "taking" point, therefore, cannot be reached unless appellant convinces this Court that the trial judge's finding that the detonations were not the proximate cause of the cracks is clearly erroneous. But if the point is reached, the authorities disclose appellant's position to be without merit.

It is well established that proof of damage alone does not necessarily prove a taking. *Bedford v. United States*, 192 U. S. 217, 224. As the Supreme Court said in *United States v. Causby*, 328 U. S. 256, 266, "it is the character of the invasion, not the

not have been eliminated by the exercise of utmost care upon the part of defendant" (R. 6). No allegation of trespass is set forth.

amount of the damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." Cf. *United States v. Caltex, Inc.*, 344 U. S. 149.

A single isolated destructive act, such as would normally be viewed as constituting a tort, done without a deliberate intent to assert or acquire a proprietary interest or dominion in the property affected, does not constitute a taking. *Bedford v. United States*, *supra*; *Harris v. United States*, 205 F. 2d 765, 767 (C. A. 10). Thus, it has been held that the firing of guns over private property is not a taking of an easement unless the firing is repeated frequently. *Peabody v. United States*, 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327; *Portsmouth Harbor Land & Hotel Co. v. United States*, 64 C. Cls. 572. Similarly, a single blasting operation by the United States causing damage to private property was held to be no more than a remediless tort in *Keokuk & Hamilton Bridge Co. v. United States*, 260 U. S. 125. Likewise, it has been held that *only* a permanent flooding, or intermittent but inevitably recurring flooding, of land constitutes a taking. Cf. *United States v. Kansas City Life Ins. Co.*, 339 U. S. 799, 809, fn. 8; *United States v. Dickinson*, 331 U. S. 745, 750-751; *North v. United States*, 94 F. Supp. 824 (D. Utah); *High Bridge Lumber Co. v. United States*, 69 Fed. 320, 326 (C. A. 6); *Matthews v. United States*, 87 C. Cls. 662, 720. Similarly, the airplane spraying of a herbicide on government property, which drifted onto and damaged private property dur-

ing a one week operation, was held not a taking. *Harris v. United States*, *supra*.⁴⁸

Property is taken in the constitutional sense, the Supreme Court has said, "when inroads are made upon an owner's use of it to an extent that, as between private parties, a *servitude* has been acquired either by agreement or in the course of time." *United States v. Dickinson*, 331 U. S. 745, 748 (emphasis added).

The record in this case does not support a taking within the principles of those cases.⁴⁹ There has been

⁴⁸ In *United States v. Causby*, 328 U. S. 256, it was held that the frequent and continuous flights by airplanes over private property at low altitudes resulted in the taking of an easement, but the Supreme Court emphasized the elements of frequency and regularity, and the Court of Claims had stated in an earlier opinion in the case, "A trespass upon the property of another, however, does not ordinarily constitute a taking, but if it is sufficiently frequent or if there is otherwise shown an intention to continue it at will, such *continued trespasses* or intention may amount to a taking" (*Causby v. United States*, 60 F. Supp. 751, 757; emphasis added).

The cases relied on by appellant (App. Br. 30-31) are of that nature, rather than like the case at bar. *E. g.*, *United States v. Welch*, 217 U. S. 333, involved a right of way which had been "permanently cut off" by the United States (217 U. S. at 339); in *Duckett & Co. v. United States*, 266 U. S. 149, 151, the Government assumed "the possession and control of the piers named, against all the world"; in *United States v. General Motors Corp.*, 323 U. S. 373, the destruction of fixtures, held to be compensable, was accompanied by the Government's complete assumption of possession of a leased building; and in *United States v. Lynah*, 188 U. S. 445, the building of dams by the United States resulted in a continuous and permanent flooding of plaintiff's land.

⁴⁹ Appellant completely overstates the case when it suggests that high explosives are "repeatedly" being tested which "in-

no continuous and permanent and deliberate assertion of dominion over appellant's property. Nothing equivalent to a servitude is involved. There were, instead, only isolated instances of detonations as an unintentional result of which, appellant claims, damage occurred. Isolated and unintentional acts of the United States resulting in damage or destruction of property do not amount to "a taking in a constitutional sense. It is, we think, rather a tortious act for which the government is only consensually liable" (*Harris v. United States, supra*, 205 F. 2d at 768). The only remedy for tortious conduct of the United States is that provided under the Tort Claims Act, and, as we have already shown, appellant's claim is not cognizable under that Act.

variably produce shock waves" which may "in the future" reach and damage its property (App. Br. 31). Appellant offers no record citation for these assertions and the record does not substantiate them. It is because the record shows only the one instance of test firing that no taking is involved. The words of Justice Holmes in *Keokuk & Hamilton Bridge Co. v. United States, supra*, are applicable here: "* * * it is enough to say that this is an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else." 260 U. S. at 127.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment below should be affirmed.

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NOVEMBER, 1956.

APPENDIX

1. The provisions of the United States Code and of the Federal Tort Claims Act provide in pertinent part as follows:

28 U. S. C. 1346. UNITED STATES AS DEFENDANT.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U. S. C. 2674. LIABILITY OF UNITED STATES.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U. S. C. 2680. EXCEPTIONS.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. The Fifth Amendment of the Constitution of the United States provides in pertinent part as follows:

No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No. 15141.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

DEC 24 1956

PAUL P. O'BRIEN, CLERK

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No. 15141.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

Preliminary Statement.

Counsel for appellant has found three typographical errors in the printed Appellant's Opening Brief which the Court is requested to have corrected, to-wit:

On page 15 the text as printed reads:

"We, therefore, submit that the evidence points to no other rational conclusion that the air shock waves produced by the atomic explosions were a proximate cause of the resulting damage to Appellant's property."

There should have been inserted therein between the word "conclusion" and the word "that" the word "then" so that as corrected the text should read:

"We, therefore, submit that the evidence points to no other rational conclusion than that the air shock waves produced by the atomic explosions were a proximate cause of the resulting damage to Appellant's property."

On page 17 the first line as printed reads:

“At we have already shown, appellee has made no rational explanation which would absolve it from negligence.”

The word “At” should have been “as” so that as amended the text should read:

“As we have already shown, appellee has made no rational explanation which would absolve it from negligence.”

On page 12, at the beginning of the second paragraph the word “Appellant” should be “Appellee.”

Appellee has served a 74-page brief, much of which relates to and discusses the activities at *planning level* which were not put in issue at the trial [R. 174-175] nor in our Opening Brief (App. Br. 21). The principal arguments in the Government’s Brief which seem to merit comment and reply in addition to the material contained in our Opening Brief are the following:

1. Did the testimony of the witness, Bruner, produce substantial evidence to support the trial court’s finding as to negligence (Gov. Br. 2, 17, 59-65)?
2. Does the *Jesionowski* case support the trial court’s determination that the doctrine of *res ipsa loquitur* did not apply?
3. Is the interpretation of the discretionary function exemption (28 U. S. C. 2680 (a)) by the most recent circuit court’s decisions which are cited in our Opening Brief (App. Br. 18-21) erroneous and contrary to *Dalehite* (Gov. Br. 53-57).

Summary of Reply Argument.

We will demonstrate in the next few pages of this Reply Brief:

1. That the Bruner testimony together with his drawing [Ex. F] did not constitute *substantial evidence* which would support the trial court's Finding XV; that the trial court did not in fact find either expressly or indirectly that the testimony of Bruner was true and accepted by it and that the contrary testimony of the appellant's witnesses was untrue; that the evidence of Bruner was entirely opinion evidence which, as a matter of law, could not be better than the facts upon which it was based and that since the witness admitted that he never saw the property until approximately five months after the buildings were shaken by the atomic explosions and the evidence of three of appellant's witnesses as to the physical facts existing at the time of the explosions were *undisputed*, Bruner's *opinion contrary to such facts is not substantial evidence* and must be disregarded. Lastly, that, since Bruner's testimony was by deposition, the presumption in support of the court's findings based upon the *conflicting substantial evidence rule* does not apply and this court may, itself, determine that such finding is clearly erroneous.

2. That the rationale of the *Jesionowski* case, when applied to the record here, demonstrates and supports our contention that the trial court committed reversible error in refusing to apply of the doctrine of *res ipsa loquitur*.

3. That *Dalehite* is clearly distinguishable from the facts in this case; that the interpretation of the discretionary function exemption set forth on pages 18-21 of our Opening Brief has been joined by the Sixth Circuit in a later decision and that, as applied to the facts here, such interpretations are correct and should be applied in this cause.

ARGUMENT.

1. The Testimony of the Witness, Bruner, Did Not Constitute Substantial Evidence to Support the Trial Court's Finding as to Negligence.

Preliminarily, the attorney who prepared the Opening Brief and is preparing this brief is concerned with the fact that no reference was made to the Bruner testimony in the Opening Brief. In fact, we had completely overlooked and forgotten such testimony while engaged in the preparation of such brief. Upon re-examining the trial court's memorandum of decision [R. 17-23] its Findings of Fact and Conclusions of Law [R. 23-30] we note that no reference was made to and no finding was made upon the purported conflict of the testimony of Bruner [R. 308-337] and the testimony of appellant's witnesses, Arthur J. Seale [R. 56, 58, 60], Chrystal B. Seale [R. 66, 68, 69] and Norwood [R. 130-136] which is referred to on page 64 of the Government's brief. We also have re-examined the voluminous briefs which were filed with the trial court and find that in no part thereof was there any reference made to or any reliance by Government Counsel upon the Bruner testimony. We mention this solely in explanation of the omission to refer to it in the Opening Brief.

It was conceded at the trial that Mr. Bruner was a qualified expert with the reservation that appellant objected to his qualification to testify as to the specific character of the construction or as to the condition of the improvements at the time when the atomic explosions occurred [R. 314]. The conclusive factor with regard to the Bruner testimony is that it did not rise to the status of *substantial evidence* for the reason that it was ex-

clusively opinion evidence which was directly contrary to undisputed physical factual evidence. Succinctly summarized the witness Bruner testified:

That settlement takes place commencing with the construction and continuously thereafter and that such settlement and the expansion and contraction caused by extreme temperature changes produced the cracks which he observed in the buildings which are involved in this litigation [R. 319-320]; that the cracks which he saw in the plaster walls and ceilings of these buildings *during April, 1952*, were both new and *old* [R. 324] and that it was his opinion that these cracks were the results of temperature changes [R. 327]; that the plaster was cracked and patched before these buildings were finished [R. 328] although he admitted that his only information was that these buildings were completed about 10 years before the date when he first saw the property [R. 323]. He referred to a drawing, which he had prepared, which was marked as Defendant's Exhibit A for identification and was so referred to in his deposition [R. 318, 320, 325 and 338]; which was later received in evidence as Defendant's Exhibit F [R. 338] and is before this court as an original exhibit. While he stated that such drawing "is typical of the construction in the Bartholomae ranch" [R. 320] in other portions of his testimony he admitted that he could not detect whether or not the plaster was fibered [R. 320, 323]; that he did not tear out any sections to learn about the construction [R. 322]; that he did not see the plans and specifications [R. 322] and that his drawing *might or might not* represent the type and character of the construction of the Bartholomae buildings [R. 325]. Furthermore, since the writing is before this court, it can de-

termine from an inspection thereof whether or not such drawing discloses any scale, or the depth of the footings in the ground, or the width of the foundations, or the type of concrete mix, or the size of the floor joists, or the type of roof, or the type of flooring or its size, or the size of the joists; whether there was roof bracing, or the type of insulation, ventilation or the numerous other factors which this court would judicially know to be a necessary and elementary part of an illustration of "typical construction": and which deficiencies are pointed out by the witness Norwood [R. 339].

The basic deficiency in the Bruner testimony which prevents it from reaching the status of "substantial evidence" is the express admission of the witness that he had never been to the property before April, 1952:

"Q. Had you ever been to this ranch before your trip, in April, 1952? A. No, sir [R. 324]."

Taken together with the *undisputed physical evidence testimony* of the Seales and the witness Norwood [Arthur J. Seale—R. 56, 58, 60; Chrystal B. Seale—R. 66, 68-69; Norwood—R. 130-132]; the photographs taken by Mr. Millard and the charts showing the character, length and directions of the cracks [Exs. 5, 10-25 incl.]. In the light of these physical facts (which directly controvert the opinion of the witness Bruner) that there *were no cracks* up to the time of the atomic explosions with which we are here concerned, the opinion that cracks had taken place prior thereto must fall and does not constitute *substantial evidence*. This court has so held in *State of Washington v. United States*, 214 F. 2d 33, at pages 41 and 43.

In addition to the foregoing, this court will recognize that the testimony of appellant's witnesses, Mr. and Mrs. Seale, and the testimony of the Government's witness, Bruner, was entirely by deposition. Thus, this court, itself, may and should weigh the testimony without the aid of any presumption favoring the decision of the trial court upon the issues presented by such testimony:

"The findings in the court below are made upon evidence which had been taken before an examiner and not in open court and they are not attended with presumptions in favor of findings which are made on conflicting testimony where the trial judge has the opportunity to observe the demeanor of the witnesses." *United States v. Booth-Kelly Lumber Co.* (C. A. 9), 203 Fed. 423, 429.

"All the testimony upon the issue having been taken out of presence of the trial court, by deposition, the presumption in support of findings based upon conflicting testimony in court does not prevail." *Rown v. Brake Testing Corporation* (C. A. 9), 38 F. 2d 220, 223-224.

To same effect, *Cf. Paraffine Companies v. McEverlast, Inc.* (C. A. 9) 84 F. 2d 335, 339.

"The evidence was by deposition taken before a commissioner and we must sit in judgment on the facts, as if at *nisi prius* and arrive at a just conclusion without the aid of any presumption favoring the decision of the trial court on the issues presented." *Turnipseed v. Moseley*, 248 Ala. 340, 27 So. 2d 483, 170 A. L. R. 882.

Lastly, the trial court did not expressly or impliedly find that the Bruner testimony and opinions are true. The only findings which could be construed to have reference to

such testimony are Findings IV and XV. Finding IV reads:

“That *during or about* the period above referred to, plaster in the buildings on the land of plaintiff shows evidence of cracking.” (Emphasis supplied.)

Finding III discloses that the “period above referred to” was the period between October 2, 1951 and November 5, 1951 when the atomic explosions here under consideration occurred. Such finding is directly in line with the testimony of appellants witnesses and directly *contrary* to the testimony of Bruner which was to the effect that the cracks had occurred before the buildings were completed and continuously thereafter and that many of the cracks which he saw when he made his first and only visit to the premises in April, 1952, were *old* and were the result of temperature changes. It is also directly contrary to the temperature charts which are annexed to and a part of the Bruner deposition.

In Finding XV the court states, in part:

“Upon the evidence before it, this court can not find that any officer or employee of the United States was negligent in the performance of his duties relating to atomic experimentation or that the atomic detonations were the proximate cause of the damage to plaintiff’s property. The court finds that blast waves released from atomic detonation during the period in question may have reached the property of plaintiff on one or two occasions during the period involved
* * *” [R. 29].

It is clear that the only portion of such part of Finding XV which could conceivably have reference to the issues presented by the Bruner testimony is:

“* * * or that the atomic detonations were the proximate cause of the damage to plaintiff’s property” [R. 29].

But, in view of the fact that the trial court had limited the period of time when the cracking in the plaster appeared to the period when the atomic blasts occurred [Finding IV in R. 25], it clearly appears that the trial court was *not* finding in line with or in affirmance of Bruner’s concept that the cracking occurred at a much earlier time and from *temperature changes or settlement*.

2. The Jesionowski Case Supports Appellant’s Contention That the Court Was in Error in Concluding That the Doctrine of Res Ipsa Loquitur Did Not Apply to This Case.

The trial court made no express finding or conclusion upon this issue but in footnote 1 to its memorandum of decision [R. 18] it held that the doctrine could not be applied because the evidence did not show that the “accident” is of such a nature that it ordinarily did not occur in the absence of negligence by the appellee. We have shown that this was reversible error (App. Br. 16-17) but the Government has replied that the *Jesionowski* case supports the trial court’s conclusion (Gov. Br. 67). To the contrary, we believe that this decision squarely supports our contentions. In the *Jesionowski* case the trial court has instructed the jury upon the doctrine because

the evidence had eliminated any possibility that such control as was had by the plaintiff could have caused the damage of which the plaintiff complained. The First Circuit *reversed*, stating in part:

“The thing that caused the injury could have been *Jesionowski’s* fault, or it could have been the railroad’s fault. It was the jury’s duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur* * * *. Thus, an essential element of the principle of *res ipsa loquitur* is that the defendant have exclusive control of the thing causing the injury. Such essential element is not clear in this case.” *Boston & Maine Railroad v. Jesionowski* (C. A. 1), 154 F. 2d 703, 705.

Stopping here, we note that in our case in footnote 1 [R. 18] the trial judge determined that, since one of the elements of the rule is that the “accident” would not ordinarily occur in the absence of negligence by the defendant and since plaster cracking could occur from temperature changes and earthquakes, *even though the uncontradicted record is that both possibilities were eliminated* through the undisputed testimony of witnesses for appellant¹ the doctrine could not be applied. Thus, the trial court’s reasoning is directly in line with the reasons and conclusions above expressed by the First Circuit.

¹As to plaster cracking, *Cf.* discussion under point one, *supra*; as to no earthquake in that area during the time of these blasts [*Cf.* Millard, R. 115-116].

The Federal Supreme Court *reversed* this concept of the First Circuit stating:

“We cannot agree. *Res ipsa loquitur*, thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, *even though it was proved that his operations of the things under his control did not cause the accident.*” (Emphasis supplied.)

It expressly found that the doctrine was properly applied by the trial court, stating:

“Thus, the question here really is not whether the application of the rule fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that (the damage) was the result of defendant’s negligence.” (Insertion supplied.) *Jesionowski v. Boston & Maine Railroad*, 329 U. S. 452, 457.

We believe that the foregoing demonstrates that where, as here, other factors which might have affected the result have been eliminated by uncontradicted evidence, the Federal rule requires that the doctrine of *res ipsa loquitur* be applied, even though it would not have been applicable had such other possible causes not have been eliminated.

3. The Interpretation of the Discretionary Function Exemption (28 U. S. C., 2680 (a)) Which Is Discussed on Pages 18 to 24 of Appellant's Opening Brief Is Not Erroneous and Contrary to *Dalehite*.

We have shown in our Opening Brief (pp. 18-24) that the Fifth Circuit and the Eighth Circuit have concluded that:

"If the Government, at the operational level, acts either contrary to the plan or in a manner not required by the plan, then the activity would not be discretionary and redress can be had for the resulting injury."

We quoted from and cited the opinion of the Eighth Circuit—*Dahlstrom v. United States*, 228 F. 2d 819, 821 and from the Fifth Circuit—*Fair v. United States*, 234 F. 2d 288, 294. Since our Opening Brief was prepared this concept has been accepted and adopted by the Sixth Circuit—*United States v. Pierce*, 235 F. 2d 466, which expressly adopted and approved the opinion of the District Court in *Pierce v. United States*, 142 Fed. Supp. 721, 730-733. We believe that these excellent and well reasoned opinions are sound and will be followed by this court.

But appellee constantly reiterates that such decisions are contrary to *Dalehite* (*Dalehite v. United States*, ^{346 U.S.} 115) and page III of the index to the Government's Brief discloses that *Dalehite* has been referred to nineteen times therein. There are certain contentions made with respect to the *Dalehite* opinion which, we believe, are erroneous.

Appellee states that *Dalehite* did *not* limit the exception here under consideration to high level policy judgment

(Gov. Br. 55). We ask this court to note the following excerpt from *Dalehite* (p. 42) which is quoted by the District Judge in *Pierce v. United States*, at page 731:

“The decisions held culpable were all responsibly made at a planning rather than operational level.
* * *

It thus appears that in *Dalehite*, irrespective of the breadth of its general language, the Supreme Court was considering and ruling upon alleged negligence arising out of decisions “made at *planning* rather than *operational* level.” (Emphasis supplied.) It is elementary that:

“* * * the language used in any opinion is to be understood in the light of the facts and the issue then before the court.” *Eatwell v. Beck*, 41 Cal. 2d 128, 136, 257 P. 2d 643.

Appellee erroneously asserts that there is a close parallel between the *facts* in *Dalehite* and in this case (Gov. Br. footnote 31, p. 37). We submit that this concept is completely fallacious and that such fallacy is demonstrated by the following. In this case the trial court found that the shock waves from these atomic explosions were capable of extreme, erratic and uncontrollable destruction and property damage, and that similar tests had caused widespread damage [Pre-trial order, Par. 7, R. 13]. The court had further found that, as to each blast, the shock wave was uncontrollable and unpredictable under the existing circumstances [Finding XV, R. 29]. Appellant's Exhibits 31 and 34 are replete with official reported statements of the known intensity and dangerous character of the shock waves which experience had shown to be the results of such tests.

But in *Dalehite*, the Supreme Court stated (p. 42):

“There must be knowledge of a danger, not merely possible but probable * * *. Here, nothing so startling was adduced. The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here. Even now no one has suggested that the ignition of FGAN was anything but a complex result of the inner acting factors of mass, heat, pressure and composition.”

It seems to the writer that it would be difficult to conceive of two cases in which the facts are so completely dissimilar.

Appellee asserts that the dissent in *Dalehite* was in basic agreement with the majority opinion. We disagree and illustrate such view with the following excerpts:

“The Government insists that each act or omission upon which the charge of negligence is predicated—involved a conscious weighing of expediency against caution and was therefore within the immunity for discretionary acts provided by the Tort Claims Act” (p. 57).

“The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down line there is immunity for every balancing of care against cost, of safety against production, of warning against silence” (p. 58).

Appellee asserts: (1) That governing bodies are not liable in tort for planning defects (Gov. Br. 22) and (2) that the government officials, themselves, cannot be held

liable (Gov. Br. 28-34). We make no such claims. Appellee further asserts (3) that appellant has failed to establish any departure or deviation from the plan (Gov. Br. 23, 43-47); (4) that the omissions of Dr. Cox were known to and concurred in by the Test Manager (Gov. Br. 24, 46) and were in the exercise of immune discretion (Gov. Br. 23, 47-53); that Dr. Cox gave several predictions of the probable blast pressure, only one of which was based on data obtained from the microbarographs (Gov. Br. 43, footnote 36 and p. 61) and (5) that it was the Test Manager and not Dr. Cox whom the appellant should have charged with negligence.

It would prolong this Reply Brief beyond permissible limits to detail and discuss all of the portions of the record which refute the foregoing assertions. We admit that the activities of Dr. Cox were known to and concurred in by the Test Manager but, as we have pointed out in our Opening Brief (App. Br. 11-12), the *plan* was to explode the bombs only when weather conditions were acceptable, the testing group had the means to make such determination and the authority to delay the explosions when such conditions did not exist. But the determination as to whether weather conditions "were, in fact, acceptable" could not be made in respect to areas which were 150 miles from the test site, except through the use of a microbarograph located in that direction [R. 266, 267, 268, 272-273, 291]. Such being the case, this record discloses, not an immune exercise of discretion, but a total failure to do an act which was a necessary predicate to the exercise of discretion. Here Dr. Cox had failed to make *any test*

or graph whatsoever in one of the four principal directional points of the compass.

It is immaterial whether the other members of the test organization joined in such negligence because it is the government (which can only act through agents) which is the responsible party here. It is well settled that there is no requirement that appellant single out and identify the particular agent whose activities have created the government's liability. (*Pierce v. United States*, 142 Fed. Supp. 721, 733.)

While it is true that Dr. Cox gave other predictions as to probable blast pressure, his testimony clearly establishes that such predictions had and could have had no connection whatever with the effect of such pressures at a distance of 150 miles from the test site. We conclude by asking, if we accept the concept of appellee, where would one draw the line? If Cox, *et al.*, could, in the exercise of immune discretion and without departing or deviating from the plan completely omit microbarograph tests toward one of the four major compass directions, could he have also exercised immune discretion and not so deviate if he determined to omit tests to the east and to the west; or to the south, east and west; or in all directions upon the assumption that the shock waves would not reach areas 150 miles distant? We think not, nor do we believe that this court will so hold. The simple and complete answer is that Cox was *not* exercising discretion but was negligently omitting an act which should have been done before he could exercise the *limited* discretion allowed to him. We

paraphrase the comment in *Somerset Seafood Co. v. United States* (C. A. 4), 193 F. 2d 631, 635, which reads:

“There is certainly no discretion to mark a wreck in such way as to constitute a trap for the ignorant or unwary rather than a warning of danger.”

By stating:

“There was certainly no discretion to omit entirely a necessary act which was the only means by which a test could have been made upon which discretion could have been exercised in conformity with the plan, in such way as to be wholly unable to decide whether or not the proposed detonations should be made or postponed.”

And, as we have pointed out in our Opening Brief only *slight negligence* is required as a foundation for liability where the actor is engaged with explosive materials of the character here involved (App. Br. 10).

It is respectfully submitted that the judgment of the lower court should ^{be reversed} ~~reserve~~ with directions to enter judgment in favor of appellant and against appellee in the sum of \$5,000.00 together with interest and costs.

Respectfully submitted,

IRL DAVIS BRETT,

Attorney for Appellant.

No. 15141

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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FILED

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No. 15141
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

Appellant, Bartholomae Corporation, pursuant to Rule 23 of this Court respectfully petitions for a rehearing of its appeal upon the following grounds:

1. This Court has erred in holding that appellant failed to prove that concussions from the atomic explosions were the *proximate cause* of the damage to the buildings owned by appellant (p. 5).¹

2. This Court has erred in holding that there was *any* evidence that such damage was caused by "other forces" (p. 5).

3. This Court has erred in holding that appellant has disregarded entirely the law of Nevada (p. 4).

4. This Court has erred in entirely disregarding and in failing to rule upon the application here, in favor of plaintiff, of the doctrine of *res ipsa loquitur*.

¹References, unless otherwise identified, are to pages of the white advance report of this Court's opinion.

5. This Court has erred in holding that the entrance of the shock waves, caused by these atomic explosions, upon appellants property was not a trespass at common law (p. 4).

6. This Court has erred in holding that the use of 3 out of 8 microbarographs in the same direction and the omission to use any to the north was not that *slight negligence* sufficient to support a judgment for appellant.

7. This Court has erred in holding that there was no partial taking of appellant's property.

8. This Court has erred in not reversing the judgment of the district court with directions to enter judgment for appellant.

Preliminary Statement.

Appellant is not so naive to believe that after the lengthy consideration this Court gave this appeal before announcing its decision of August 15, 1957, it could now be persuaded to change its judgment to the extent of reversing the lower Court. We are now concerned with persuading this Court to *continue its jurisdiction* by granting this petition for rehearing so that it can correct *patent errors*, which if not corrected or deleted would probably preclude any possibility that appellant could persuade the Federal Supreme Court to even *consider* a petition for certiorari because of that Court's long standing rule that it will not inquire into the verity of the facts as recited in the opinion of the Appellate Court.²

²FACTUAL ISSUES. The Supreme Court will usually deny certiorari * * * to review a factual issue—or to reverse on such an issue if certiorari is granted for some other reason—where the findings of fact made by the district court receive the concurrence of the court of appeals. In that situation the Court has often held

Appellant understands the reluctance of this Court to attempt to distinguish this cause from that presented in *Dalehite v. United States*³ and its apparent unwillingness to extend the concept of a constitutional taking beyond the definition stated in *United States v. Dickinson*⁴, even though, as we showed by our briefs, the facts in those cases and the facts here are completely different and neither this Court nor the Supreme Court has ever previously passed upon a case in which these *admitted* factual circumstances existed: (1) the actions taken were compulsory⁵ (p. 5); (2) the forces released were uncontrollable and unpredictable⁶ (p. 5); (3) the United States was in complete charge and knew from *previous experience* that such released forces (shock waves) were capable of extreme, erratic and uncontrollable destruction and property damage⁷ and (4) that similar tests had caused widespread damage in the past.⁷

that "a court of law, such as this Court is, rather than a court for corrections of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U. S. 271, 275, and cases cited, *idem*, 339 U. S. 605.

Robert L. Stern and Eugene Gressman, *Supreme Court Practice*, Second Edition—Revised Rules, July, 1954, pp. 125-126.

³*Dalehite v. United States*, 346 U. S. 15, 44-45.

⁴*United States v. Dickinson*, 331 U. S. 745, 748.

⁵"But, these officers were under direct mandate of Congress and the Executive to proceed."

⁶"Such (shock or blast) waves (by atomic detonation) are uncontrollable and unpredictable." *Cf.*, Finding XV [p. 3].

⁷"The United States, through previous experiments made by the Atomic Energy Commission knew that these shock waves were capable of extreme, erratic and uncontrollable destruction and property damage; that similar (though not necessarily the same intensity of) explosive tests had caused widespread damage * * *" Par. 7 Pretrial Order, Tr. 13.

We believe that since (as this Court may judicially notice) the United States has continued to and, apparently, will hereafter proceed to conduct these nuclear tests, the principles here involved justify the attempt to have the nation's highest tribunal to consider and determine whether, as is now indicated by this Court's decision, the party so damaged is without remedy—except the grace of a special act of Congress.

But the present decision, unless modified, would preclude such attempt because this Court has held (1) that appellant did not prove that the shock waves were the *proximate cause* of the damage to appellant's property (p. 5); (2) that there was evidence that such damage was caused by *other forces* (p. 5) and (3) that there is no applicable law because Nevada has not yet legislated or ruled by judicial decision upon such issue (p. 4).

We believe all three of these holdings are erroneous and without support by the record and ask this Court to delete or correct them.

We shall not make further references to the other errors heretofore listed as items 4 to 8 inclusive, although we believe each is an obvious error by this Court. We list them solely that it may not be contended by appellees in the future that we had waived the same.

ARGUMENT.

I.

The Record Requires This Court to Find That the Shock Waves Were the Proximate Cause of the Damage to Appellant's Property.

As this Court has held (p. 3), the law of Nevada controls here and such law requires a plaintiff (appellant here) to prove that the acts of the United States (the defendant charged) were the proximate cause of the ensuing damage (p. 5 and cases cited). Proximate cause is defined in judicial decisions by Nevada as

“* * * that which immediately precedes and produces the effect as distinguished from remote (causes) * * *”

Lonabough v. V. T. & R. R. Co., 9 Nev. 271
quoted and approved in *Konig v. N. C. O. Ry.*,
36 Nev. 181, 212; 135 Pac. 141.

See also:

Wells Inc. v. Shoemaker (1947), 64 Nev. 57, 70;
177 P. 2d 451, 458; and

Smith v. Smith-Peterson Co., 56 Nev. 79, 94; 45
P. 2d 785-791.

To keep this brief within reasonable limits we will but summarize the evidence here. The construction of these buildings was exceptionally strong. Detailed inspection was made by an experienced contractor and builder on September 8, 1951 [Tr. 126-127] and, except in one place, there were no visible cracks in the plaster [Tr. 130]; the buildings were twice violently shaken during the occurrences of the atomic explosions of October 22

and November 5, 1951 (p. 2); immediately thereafter, the plaster in the walls and ceiling was cracked and the cracks kept spreading [Tr. 66 and 69] with a resulting damage to the buildings of \$5,000.00 [Tr. 136] or more [Tr. 150-151]. Appellant, also *by express testimony* eliminated every other conceivable cause of such plaster cracking (App. Op. Br. pp. 13-14).

Yet, despite the fact that this evidence was entirely uncontradicted, the trial court could not find that the atomic explosions were the proximate cause of the damage and this Court has upheld such ruling and stated

“But there was no proof that any damage was caused to the buildings thereby” (p. 5).

Appellant and its counsel are completely mystified. This Court has apparently conceded (as this record required it to do) that the atomic shock waves rushed in and around these buildings and the evidence is conclusive that there was *no damage before* and there *was damage immediately after* such “shakings”. What other evidence, we respectfully inquire, must be produced to establish proximate cause?

As stated in page 5 of our opening brief, Nevada holds that where (as here) no other cause has intervened, the original cause, producing the damage, is the *proximate cause* (*Smith v. Smith-Peterson Co.*, 56 Nev. 79, 94; 45 P. 2d 785, 791).

We respectfully request that this Court amend and correct its judgment to so accord with the facts and such law.

II.

There Was No Evidence in This Record That the Damage to Appellant's Property Was Caused by Any Cause or Force Other Than the Concussions From These Atomic Explosions.

The trial court made no finding that there was such other cause. However, this Court said

“There was some evidence that the damage was caused by other forces” (p. 5).

We respectfully request that such be *identified in the record* or that such statement be *deleted*. The vice of this erroneous statement, like the error referred to under Point I, is that if we seek certiorari, government counsel will point to them and say that it is unnecessary to reach the important constitutional questions upon which we will seek a ruling because *this Court has held that it was not atomic blasts but other causes which caused the damage* and the Supreme Court, in accord with its practice, will not examine the record to determine whether it does or does not support your factual statement.⁸

III.

Appellant Did Cite All Applicable Nevada Law.

This Court has held that appellant failed to cite applicable Nevada law. To the contrary, we researched that law from the beginning to the date of our briefs and explained expressly why we could not cite any which was applicable (*Cf. Op. Br. p. 11, fn. 2*). While this is not as vital as our first two points, we respectfully request that such erroneous charge be deleted.

⁸See footnote 2, *supra*.

IV.

Where There Is No Nevada Law Governing the Subject Matter the Courts Resort to the Weight of Authority Established by State Law.

Lastly, it is not the law that, absent Nevada law on the subject, there is *no law* which this Court (or the lower Court) could apply. To the contrary, the Court should then “resort to the general doctrines of accepted tort law whence state judges derive their governing principles in novel cases.”⁹

Britton v. Harrison Const. Co. (D. C. Tenn.), 87 Fed. Supp. 405, 407;

Dalehite v. United States, 346 U. S. 15, 53 (dissenting op.).

V.

Conclusion.

Without waiving appellant’s objections to errors above listed and identified as numbers 4 to 8 inclusive, and assuming that this Court will probably adhere to its decision to affirm the lower Court’s judgment we respectfully request and submit that it may do so upon the grounds stated in its prior opinion and at the same time correct and delete therefrom the erroneous statements that appellant did not establish the proximate cause of its damage, that the record disclosed a proximate cause thereof other than the shock waves from the atomic ex-

⁹*Cf.* these state cases in addition to those submitted under Point V, pages 25-28, in appellant’s opening brief: *Crino v. Campbell* (1941), 41 N. E. 2d 583, 585, 68 Ohio App. 391, and *Dixon v. N. Y. Trap Rock Co.* (1944), 58 N. E. 2d 517, 518, 293 N. Y. 509.

plosions, that appellant failed to supply this Court with applicable Nevada law and that there is no law which this Court could presently apply.

Respectfully submitted,

IRL DAVIS BRETT,

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Certificate of Counsel.

Pursuant to Rule 23, I certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

IRL DAVIS BRETT,

Attorney for Appellant.

